Vanderbilt Law Review

Volume 58 | Issue 1 Article 1

1-2005

Canons of Construction and the Elusive Quest for Neutral Reasoning

James J. Brudney

Corey Ditslear

VANDERBILT LAW REVIEW

VOLUME 58 JANUARY 2005 NUMBER 1

Canons of Construction and the Elusive Quest for Neutral Reasoning

James J. Brudney and Corey Ditslear***

* Newton D. Baker-Baker & Hostetler Chair in Law, The Ohio State University Moritz College of Law.

** Assistant Professor of Political Science, University of North Texas. We are grateful to Lawrence Baum, Victor Brudney, Ruth Colker, Bill Eskridge, Cindy Estlund, Phil Frickey, Beth Garrett, Dean Lacy, Dale Oesterle, Steve Ross, Marc Spindelman, and Peter Swire for insightful comments on earlier drafts of this Article. Steve Abreu, Steve Barsotti, Patrick Brodhead, Sara DePaul, Rebecca Frihart, Shannan Katz, Brian Ray, Dan Riedl, and Sara Sampson provided excellent research support as well as valuable assistance in compiling the data base. Jennifer Pursell and Michele Whetzel-Newton furnished first-rate secretarial support. The Moritz College of Law contributed generous financial assistance. All remaining errors are ours.

INTRODUCTION

Federal statutes, like the lawmaking enterprise itself, are seldom models of efficiency. Whether through inevitable laxity[1] or conscious choice,[2] Congress when legislating leaves a fair number of

1. Procedural complexities and practical constraints impose substantial pressure on legislators seeking to enact new laws. One recurrent example of inadvertent drafting oversight involves federal statutes that lack an explicit limitation period within which to initiate legal action. *See* North Star Steel Co. v. Thomas, 515 U.S. 29, 33 (1995) (referring to numerous specific federal laws that fail to provide a limitations period). While there may be rare instances in which this decision is conscious and deliberate, *see infra* note 2, it generally reflects simply insufficient attention to detail.

2. Occasionally, the pressure of the legislative process may give rise to deliberate ambiguities around which a pro-enactment majority can form. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 262-63 (1994) (concluding, based on review of legislative history, that supporters of 1991 Civil Rights Act "agreed to disagree about whether and to what extent the Act would apply to preenactment conduct"); *see generally* Miriam R. Jorgensen & Kenneth A. Shepsle, *A Comment on the Positive Canons Project*, 57 LAW & CONTEMP. PROBS. 43, 44-45

gaps in the meaning of its complex regulatory schemes. In filling those gaps with case-specific interpretive responses, federal courts perform an important policymaking function.[3]

Such policymaking has lately generated increased concerns about the politicization of the judiciary.[4] Scholars using social science techniques have contributed to the image of courts as policymakers, by establishing that judges' political party affiliation and ideological orientation are at times significant predictors of voting behavior.[5] Presidents and senators have implicitly endorsed this image through their sharp-edged insistence on scrutinizing candidates and nominees for ideological compatibility.[6] Even some judges, by candidly discussing the role of personal beliefs and value judgments in their decisionmaking matrix, acknowledge a policy-oriented dimension to their interpretation of statutes, albeit as a junior partner in the lawmaking enterprise.[7]

This acknowledgement of political influence is difficult to reconcile with the prevailing conception that our courts derive their legitimacy in large part from objective and transparent methods of judicial decisionmaking.[8] The tension between judges as value-

---

(Winter 1994). Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2155 (2002).

3. Congress also invites this gap-filling from executive branch agencies. Edward Rubin, *Dynamic Statutory Interpretation in the Administrative State*, ISSUES IN LEGAL SCHOLARSHIP 2, at 5 (Nov. 2002), *at* http://www.bepress.com/ils/iss3/art2/.

4. Plausible legal contentions tendered in a courtroom often reflect the ideological preferences of diverse interest groups. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (adjudicating tobacco industry's right to engage in certain forms of cigarette advertising); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (adjudicating extent of government's ability to regulate internet access); *See* John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 64-65 (Summer 2002).

5. *See* TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 111-17 (1999) (discussing empirical scholarship that links presidential expectations to Supreme Court Justices' performance); James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 162 & n.43 (2003) (summarizing recent studies that demonstrate association between political affiliation and judicial behavior in U.S. courts of appeal).

6. Brudney, *supra* note 5, at 153-56; Lisa Holmes & Elisa Savchak, *Judicial Appointment Politics in the 107th Congress*, 86 JUDICATURE 232 (2003); *see also* Nancy Scherer, *The Judicial Confirmation Process: Mobilizing Elites, Mobilizing Masses*, 86 JUDICATURE 240 (2003) (discussing role of ideological interest groups in federal judicial selection process).

7. For examples of judges acknowledging that policy influences decisionmaking, see RICHARD A. POSNER, OVERCOMING LAW 123-26 (1995); Stephen Reinhardt, *Dialogue: Good Judging*, 2 GREEN BAG 2D 299, 301-02 (1999); Mary M. Schroeder, *Compassion on Appeal*, 22 ARIZ. ST. L.J. 45, 49 (1990). *See generally* Aharon Barak, Foreword, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 34-35 (2002).

8. Notwithstanding a diverse chorus of dissenters, *see* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 65-159, 339-419, 422-501 (1995) (discussing perspectives from legal realism, critical legal theory, and law and economics), the traditional lawyerly account of judicial decisionmaking envisions a reasoned, ideologically neutral elaboration of text and its

promoting policymakers and judges as principled, impartial actors implicates a core aspiration of our legal culture: that judicial techniques of reasoning are or ought to be both reasonably predictable and outcome-neutral. This Article explores a central aspect of that aspiration by examining the Supreme Court's expressed reliance in recent decades on one assertedly neutral reasoning technique—the canons of construction—in one area of substantive doctrine, the law of the workplace.

Our approach is both empirical and doctrinal. We rely on bivariate and regression analyses to illuminate how the canons have been used in our dataset of more than 600 cases—over periods of time, across different subject matter categories, by individual Justices, and in closely contested decisions. We then analyze selected individual opinions in some detail to assess several competing theoretical accounts of how the canons operate. Through this combination of methods, we evaluate the role that the canons have played in justifying the Supreme Court's workplace jurisprudence.

Our focus on canons of construction is especially timely given that their use is experiencing a renaissance among judges and legal scholars.[9] Judges, especially textualist-oriented judges, praise the canons for their relative clarity and commonsense virtues.[10] Public choice scholars claim that the canons substitute for lack of judicial expertise and minimize error costs.[11] Legal process theorists defend the canons as "off-the-rack" interpretive rules that guide judicial discretion and render statutory meaning more predictable.[12] On the other hand, more pessimistic accounts suggest that the canons are being used strategically, to justify judicial policy preferences or to

---

accompanying precedents. *See, e.g.*, Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634-35 (1995); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737-38 (1987). Judges themselves have tended to embrace this account. They recognize the role of discretion in deciding particular cases, especially at the appellate level, but insist that such discretion can be appropriately channeled through a more or less coherent reliance on statutory language, prior judicial decisions, and logical reasoning. *See, e.g.*, FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING & JUDGING 258-62 (1994); Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965, 987-88 (1993), Harry T. Edwards, *The Role of the Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEVE. ST. L. REV. 385, 388-95 (1983); Ferejohn, *supra* note 4, at 65.

9. *See* John F. Manning, *Legal Realism and the Canons' Revival*, 5 THE GREEN BAG 2D 283, 289-95 (2002).

10. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25-27 (1997).

11. Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 658-68 (1992).

12. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 67 (1994); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 943 (1992).

frustrate clear legislative intent.[13] We consider each of these assertions about methodological utility, as well as the underlying issues of whether and to what extent reliance on the canons correlates with ideological positions embodied in the Court's opinions.

Our database consists of every decision addressing workplace law matters since the start of the Burger Court era: 632 cases with written opinions from 1969 to 2003.[14] For each case, we classified outcomes as liberal (basically pro-employee or union) or conservative (basically pro-employer)[15] and identified the substantive statutory or constitutional provisions being interpreted and applied. Most importantly, in order to assess judicial reasoning techniques we coded the textual and contextual resources on which authoring Justices expressly relied in their majority or dissenting opinions. Majority opinions depend upon the canons of construction as part of their reasoning in some 160 instances, more than one-fourth of all decisions.

Our results include some elements that might be readily anticipated and others that are unexpected. Not surprisingly, the Court's reliance on both language canons and substantive canons[16] in its majority opinions has virtually doubled from the Burger to the Rehnquist eras, even as the Court's reliance on legislative history has steadily declined. Yet, dependence on the canons has not been uniform across all substantive areas of workplace law: for instance, language canon reliance has been especially frequent in opinions implementing minimum standards statutes and the employee benefits provisions of ERISA.[17] Reliance on the canons also has varied considerably among Justices. For example, the heaviest users of language canons in majority opinions include both textualists such as Justices Scalia and Thomas and pragmatists such as Justices Stevens and Blackmun. The latter pair, however, often combine invocation of canons with reliance on legislative history or statutory purpose, something that is rare among textualists.

---

13. *See, e.g.*, Stephen F. Ross, *Where Have You Gone Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 562 (1992); Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579 (1992).

14. *See infra* Part II. for discussion of how we constructed the database.

15. *See infra* Part II. for discussion of our classification approach, including identification of the small number of cases with no ideological direction.

16. Language canons address grammar rules and the arrangement of words or phrases within a statute, in an effort to clarify the ordinary or common meaning of legislatively chosen text. Substantive canons reflect judicially perceived policy priorities related to the common law, statutes at some general level, or the Constitution. *See* Part I.B. *infra* for further explanation of the distinction between these two categories of canons.

17. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (2000).

Beyond their intrinsic interest, our findings shed light on certain claims made by legal scholars praising or doubting the canons' role as neutral and predictable interpretive norms. There is some support for public choice proponents' assertions that decisions interpreting complex and technical statutes, or resolving interpretive questions of a less ideologically charged nature, are more likely to involve language canon reliance. After analyzing several such decisions, however, we suggest that this reliance is best explained by reference to characteristics of the statutory provisions under review rather than to the Justices' desire to avoid error or embarrassment.

Of greater import are our conclusions with respect to pessimistic claims that the Justices use canons to reinforce ideological predispositions, often at the expense of discoverable legislative purposes. Our findings indicate that canon usage by Justices identified as liberals tends to be linked to liberal outcomes, and canon reliance by conservative Justices to be associated with conservative outcomes. We also found that canons are often invoked to justify conservative results in close cases—those decided by a one-vote or two-vote margin. Indeed, closely divided cases in which the majority relies on substantive canons are more likely to reach conservative results than close cases where those canons are not invoked.

In addition, we identified a subset of cases in which the majority relies on canons while the dissent invokes legislative history: these cases, almost all decided since 1988, have yielded overwhelmingly conservative results. Doctrinal analysis of illustrative decisions indicates that conservative members of the Rehnquist Court are using the canons in such contested cases to ignore—and thereby undermine—the demonstrable legislative preferences of Congress. Taken together, the association between canon reliance and outcomes among both conservative and liberal Justices, the distinctly conservative influence associated with substantive canon reliance in close cases, and the recent tensions in contested cases between conservative majority opinions that rely on canons and liberal dissents that invoke legislative history, suggest that the canons are regularly used in an instrumental if not ideologically conscious manner.

Finally, we discovered little evidence to support legal process scholars' claims that the canons serve as consistent or predictable guides to statutory meaning. Our dataset includes a number of decisions in which both majority and dissent rely on canons, and we found that majority reliance on language canons is likely to be accompanied by dissent invocation of language canons, and majority use of substantive canons is similarly linked to dissent dependence on

substantive canons. Such results suggest that the Justices themselves are inclined to disagree about the clarity or predictability of canon-based reasoning. Doctrinal consideration of some of these "dueling canon" cases illustrates the malleability of both language and substantive canons, and demonstrates how reliance on the canons does not seriously limit judicial discretion. Overall, our findings and analyses offer some sobering lessons regarding formalist claims that the canons can promote either impartiality or consistency in judicial reasoning.

Part I of the Article briefly describes the canons' role as an interpretive resource for courts, including the basic distinction between language and substantive canons. Part I also discusses scholars' current theoretical claims on behalf of the canons and identifies three such claims that we will attempt to evaluate using our database. Part II relates the methods we used to assemble and analyze our database, including how we assessed judicial outcomes and how we coded different types of judicial reasoning. Part III presents our findings, using tables that reflect aggregate data as well as some description of individual approaches by different Justices. Part IV pursues key aspects of our findings in doctrinal terms by analyzing certain illustrative decisions, and also situates our results in a broader context.

I. THE CANONS AS A FORM OF JUDICIAL REASONING

The phrase "canons of construction" is understood to encompass a set of background norms and conventions that are used by courts when interpreting statutes.[18] While the Supreme Court recently referred to them as "simply rules of thumb which will sometimes help courts determine the meaning of legislation,"[19] the reality of their use is more complicated. Federal judges regularly exercise broad discretion in deciding when the canons should apply, which ones to invoke in a particular setting, and how to reconcile them with other contextual resources such as specific legislative history, general statutory policy or purpose, and deference to agency determinations.

---

18. *See* CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 147 (1990); Eskridge and Frickey, *supra* note 12, at 65-67. Such background norms and conventions may also be applied to interpret common law sources or constitutions, but our primary focus here is on their use as part of statutory construction.

19. Varity Corp. v. Howe, 516 U.S. 489, 511 (1996) (internal quotation marks and citation omitted).

A. Descriptive and Normative Controversy

Canons or maxims of interpretation have an impressive pedigree. They were used as interpretive aids in a number of ancient legal and religious settings,[20] and Anglo-American judges have relied on them for at least 400 years.[21] Despite their durability, however, the canons have been controversial in the modern American context.

Professor Karl Llewellyn's classic critique, which listed a counter-canon for each of twenty-eight canons, highlighted what he viewed as the canons' radical indeterminacy.[22] More generally, legal realists assailed the canons as insincere if not deceptive, because their mechanistic and acontextual approach ignored the presence of an "assumed purpose"[23] that inevitably informs a judge's interpretive enterprise.[24] Contemporary scholars have echoed this refrain, observing that canons "presume . . . that a statute is primarily a linguistic artifact" when in fact statutory content and direction are distinctly purposive and value-laden.[25]

Since 1990, many legal academics have sought to rehabilitate the role that canons play in statutory interpretation. Starting from the premise that courts continue to say they rely on canons notwithstanding decades of withering scholarly reviews, Professor Cass Sunstein maintains that the canons serve a valuable practical function.[26] Understanding congressional text inevitably involves accepting certain background principles, both about "how words should ordinarily be understood [and about] how regulatory statutes should interact with constitutional structure and substantive policy."[27]

---

20. *See* Geoffrey P. Miller, *Pragmatics and The Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1183-91 (1990) (describing use of interpretative norms and conventions in construing ancient Hindu texts, in medieval Christian commentary on the Bible, in Talmudic commentary on the Old Testament, and in interpretations of Roman Law).

21. *See* Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 542-43 (1998) (discussing use of canons of statutory construction in sixteenth century English case law).

22. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

23. *Id.* at 400.

24. *See, e.g.*, Frederick J. De Sloovere, *Extrinsic Aids in the Interpretation of Statutes*, 88 U. PA. L. REV. 527, 536-37 (1940); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873-75 (1930); *see also* Mank, *supra* note 21, at 544-45 (discussing critiques by realists).

25. Rubin, *supra* note 13, at 580; *see also* Louis Fisher, *Statutory Construction: Keeping a Respectful Eye on Congress*, 53 SMU L.REV. 49, 49 (2000) (judges often become "so preoccupied with the minutiae of the canons of statutory construction . . . that they lose sight of institutional interests").

26. SUNSTEIN, *supra* note 18, at 147-57.

27. *Id.* at 150.

Professors William Eskridge and Philip Frickey build on this pragmatic approach, arguing that the canons further rule-of-law norms. Their accessibility as "off the rack, gap-filling" principles enhances the clarity of enacted law *ex ante* for drafters and *ex post* for interpreters.[28] Certain canons also should be viewed as ordering mechanisms or "signaling devices": because policy-related canons carry presumptive weight with the federal courts, they inform Congress that it must draft in clear and specific terms in order to trump the policy-related presumption.[29]

In addition to these pragmatic and institutional process justifications, public choice academics have explained the canons as serving the judiciary's more strategic self-interest. Professors Jonathan Macey and Geoffrey Miller suggest that, whether consciously or not, judges use canons as an expedient when they lack a policy-based justification for their decision.[30] Assuming *arguendo* that judges develop personal policy preferences just as other political actors do, and that these preferences are an important motivating factor for judicial decisions, Macey and Miller contend that the canons come into play primarily in the unusual circumstances when a judge has no preferred policy position.[31] Such situations tend to arise because the judge has neither expertise nor strongly held convictions with regard to the subject matter area or substantive issue being litigated.[32] Macey and Miller maintain that when a case involves complex and technical areas of the law, where judges generally have less knowledge and are not as concerned about the policy consequences, courts will rely more on the canons—as a content-neutral substitute for specialized expertise and as a means of avoiding errors that could have substantive law implications.[33]

A third and more pessimistic assessment is that the canons are at times used by judges to frustrate the policy preferences of the legislature. Professor Stephen Ross contends that certain linguistic canons regularly invoked by conservative Justices in recent years rest on the inaccurate presumption that Congress is an omniscient

28. Eskridge & Frickey, *supra* note 12, at 66-67.

29. *Id.* at 68-69; *see* Shapiro, *supra* note 12, at 943-45 (discussing canons' role in providing predictability and fair notice); *see also* Lori Hausegger & Lawrence Baum, *Inviting Supreme Court Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POL. SCI. 162 (1999) (discussing Court's willingness to signal Congress in majority opinions through invitations to reverse its statutory interpretation decisions.).

30. Macey & Miller, *supra* note 11, at 660.

31. *Id.*

32. *Id.*

33. *Id.* at 660-64.

drafter.[34] Some policy-related canons favored by the Rehnquist Court majority also have drawn fire for assuming an unrealistic level of congressional foresight.[35] In concluding that Congress's omission of a particular group from a protected list signals the group's exclusion from coverage, or that Congress's failure to be sufficiently explicit about state government liability means no such liability may attach, the Court may be ignoring clearly discoverable legislative purpose. For Ross and other skeptical scholars, the canons tend to serve as a façade, useful to support decisions that reflect judicial policy preferences notwithstanding a different congressional intent.[36]

Controversy about the canons has not been confined to the academy. Federal judges also disagree about their value in statutory interpretation. Justice Scalia considers the canons—particularly those related to the grammar and structure of statutes—to be commonsense rules of inference that serve as important guides to the meaning of legislative text.[37] The fact that these canons may on occasion be overridden by contrary indicia of meaning, including other canons, simply indicates they are persuasive rather than conclusive. For Scalia, the existence of competing interpretive possibilities does not tarnish the canons' dual role of making interpretation more predictable for parties and encouraging Congress to draft laws in a more consistent and precise manner.[38]

Judge Posner, by contrast, is more skeptical about the canons, especially the language canons. He regards them as generally without value even when invoked as flexible guidelines or presumptions because they are premised on "wholly unrealistic conceptions of the legislative process."[39] Given that Congress is far from omniscient in

---

34. Ross, *supra* note 13, at 572.

35. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 907-08 (3d. ed. 2001) (discussing effect of newly emphasized substantive canons in disrupting settled congressional expectations about how the Court would approach the political process).

36. Ross, *supra* note 13, at 562; Rubin, *supra* note 13, at 590; *see also* Shapiro, *supra* note 12, at 958-59 (expressing concern about such misuses, which he views as episodic rather than systemic).

37. SCALIA, *supra* note 10, at 25-27. Justice Scalia is less sanguine about canons that create default rules and presumptions of substantive policy, although he expresses support for some substantive canons as reflecting imbedded understandings about our constitutional structure. *See id.* at 28-29 (describing how most substantive canons present "[t]o the honest textualist . . . a lot of trouble" but defending canons that protect states' sovereign immunity against congressional action because they are essentially variants on "normal interpretation").

38. *Id.* at 27; *see also* Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (describing role of canons in clarifying the ordinary meaning of text); Finley v. United States, 490 U.S. 545, 554 (1989) (applying canon to invite Congress to draft clearly when it wishes to make a substantive change from settled textual meaning).

39. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 277 (1985).

either its linguistic drafting process or its ability to appreciate policy problems that its legislative product will encounter, judges have no adequate basis for invoking special rules of inference based on a presumed level of knowledge or foresight.[40] Posner understands that judges continue to rely on the canons "to give [their] opinion[s] the form of logical deduction," but he objects to the way canons disguise the creative elements of statutory construction by presenting the interpretive process as essentially mechanical.[41]

One instructive aspect of these often heated debates is that so many scholars and judges believe the canons perform important interpretive functions. Moreover, despite spirited disagreements about whether the canons serve merely to rationalize results reached on other grounds, judges continue to refer to them as an integral part of the *ratio decidendi* that drives their decisions.

Admittedly, discovering whether judicial reliance expressed in a written opinion actually determines or even contributes to the underlying result is no mean feat. For close statutory cases that can plausibly be justified in either direction, a conscientious judge generally has available many reasoned arguments, derived from a range of interpretive resources. At times, individual values or policy preferences may shape the weight or priority given to each interpretive resource in arriving at a coherent, principled outcome.[42] The subconscious nature of some of these preferences complicates any attempt to discover the precise role played by the canons, even when the judge deems them principal as opposed to cameo performers.

We are aware of this difficulty, and we do not attempt to calibrate the complex mixture of intellectual reasoning and personal value judgments that contribute to judicial opinions relying at least in part on the canons. Rather, we wish to identify patterns or trends of expressed reliance on the canons in the Court's workplace law opinions, and to consider whether those patterns support or undermine the leading theorized accounts of how canons operate.

---

40. *Id.* at 279-82. Posner does see some merit in certain substantive canons. *See id.* at 283-85 (discussing rule of lenity and canon of constitutional avoidance).

41. *Id.* at 285-86; *see also* T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning,* West Virginia Univ. Hospitals, Inc. v. Casey, *and Due Process of Statutory Interpretation,* 45 VAND. L. REV. 687, 688-89, 696-97 (1992) (criticizing Court's overly mechanical and insufficiently purposive "plain meaning" approach).

42. *See* DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE 349-50, 445-47 (1998); John M. Ferren, *General Yamashita and Justice Rutledge,* 28 J. SUP. CT. HIST. 54, 70-73 (2003).

B. Language Canons and Substantive Canons

A further dimension of the controversy surrounding the canons is that these background interpretive guides are far from monolithic. They operate in distinctive ways and are justified in varied normative terms. Some canons address the uncertainty inherent in all written language, while others respond to the tensions that arise between creation and implementation of legislative directives. Canons have been identified as techniques for clarifying the ordinary meaning of text, assuring continuity in the law, respecting constitutional principles such as federalism and due process, and enhancing the policies that underlie certain federal statutes.[43] While scholars have classified the canons' functions and goals in numerous ways,[44] we have chosen to follow the prevailing taxonomy that divides the canons into two basic categories: linguistic and substantive.[45]

Language canons consist of predictive guidelines as to what the legislature likely meant based on its choice of certain words rather than others, or its grammatical configuration of those words in a given sentence, or the relationship between those words and text found in other parts of the same statute or in similar statutes.[46] These canons do not purport to convey a judge's own policy preferences, but rather to give effect to "ordinary" or "common" meaning of the language enacted by the legislature, which in turn is understood to promote the actual or constructive intent of the legislature that enacted such language.[47] The language canons most often invoked by the Justices in workplace law decisions during this period are the Whole Act Rule and its various permutations, suggesting that each term or provision

---

43. *See* ESKRIDGE, FRICKEY, & GARRETT, *supra* note 35, at Appendix B (listing over one hundred canons derived from Supreme Court opinions in 1986 through 1993 Terms).

44. *See, e.g.*, SUNSTEIN, *supra* note 18, at 150-56 (grouping the canons into four basic functional categories: those that clarify statutory meaning, those that illuminate interpretive instructions from the legislature, those that promote better lawmaking, and those that serve a judicial, constitutional, or commonsense substantive purpose); Eskridge & Frickey, *supra* note 12, at 66-69 (describing the canons as serving rule-of-law purposes such as clarity and predictability, and institutional coordination purposes such as distributing certain decisional power to the courts and signaling judicial preferences for specific policy priorities).

45. For explanations of this dichotomy in some detail and with examples, see Shapiro, *supra* note 12, at 927-941; ESKRIDGE, FRICKEY & GARRETT, *supra* note 35, at 819-36, 848-54, 873, 889. *See also* Ross, *supra* note 13, at 563 (summarizing basic distinction between descriptive canons, which are guidelines to legislative intent based on particular uses of language, grammar, or syntax, and normative canons, which advise legislators that ambiguous text will be construed in favor of certain judicially crafted policy objectives).

46. ESKRIDGE, FRICKEY & GARRETT, *supra* note 35, at 818.

47. Ross, *supra* note 13, at 563; Shapiro, *supra* note 12, at 927.

should be viewed as part of a consistent and integrated whole,[48] and the *expressio unius* maxim, under which the inclusion of one term or concept in text suggests the exclusion of opposite or alternative terms and concepts not mentioned.[49] Other frequently used language canons are the *in pari materia* guideline, which presumes that similar statutes should be interpreted similarly and also that Congress uses the same term consistently in similar statutes,[50] and the *ejusdem generis* maxim, under which a general term is understood to reflect the class or type of objects identified in more specific terms as part of the same sentence or provision.[51]

Substantive canons, unlike their linguistic counterparts, *are* generally meant to reflect a judicially preferred policy position. They are not predicated on what the words of a statute should be presumed to mean, or what a rational Congress presumptively must have meant when it chose to use them. Rather, substantive canons reflect judicially-based concerns, grounded in the courts' understanding of how to treat statutory text with reference to judicially perceived constitutional priorities, pre-enactment common law practices, or specific statutorily based policies.[52] These judicially articulated values serve as presumptions that can be rebutted by sufficiently weighty evidence of contrary meaning found in text and sometimes in legislative history or purpose. Substantive canons may function as mere tiebreakers, but in recent years they often have been heavier weights on the interpretive scale, especially when the Supreme Court has characterized them as "clear statement" rules that can be rebutted only by express language in statutory text.[53] Substantive canons often relied on by the Court in the workplace law setting include the need to avoid interpretations that would jeopardize a statute's

48. For examples of the Court's application of forms of the Whole Act Rule, see Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 119 (2002); Sutton v. United Airlines, 527 U.S. 471, 482, 487 (1999); American Hosp. Ass'n v. NLRB, 499 U.S. 606, 610-611, 613 (1991).

49. For examples of the Court's application of the *expressio unius* maxim, see Barnhart v. Sigmon Coal Co. 534 U.S. 438, 452-53 (2002); Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 209 n.11 (1994); Northwest Airlines Inc. v. Transp. Workers Union, 451 U.S. 77, 93-94 (1981).

50. For examples of the Court's application of *in pari materia*, see Pollard v. E. I. DuPont de Nemours & Co., 532 U.S. 843, 848-49 (2001); Communications Workers of America v. Beck, 487 U.S. 735, 745-46 (1988); Ford Motor Co. v. EEOC, 458 U.S. 219, 225-26 & n.8, 233 n.19 (1982).

51. For examples of the Court's application of the *ejusdem generis* maxim, see Circuit City Stores v. Adams, 532 U.S. 105, 114-15 (2001); Breininger v. Sheet Metal Workers Union, 493 U.S. 67, 91-92 (1989). *See also* Dole v. United Steelworkers, 494 U.S. 26, 36 (1990) (applying closely related *noscitur a sociis* canon).

52. ESKRIDGE, FRICKEY, & GARRETT, *supra* note 35, at 848.

53. *See id.* at 850-51 (providing a list of Supreme Court decisions that used canons of construction); *see also* Astoria Fed. Sav. & Loan Assn. v. Solimino, 501 U.S. 104, 108-09 (1991) (distinguishing between clear statement rules and presumptions).

constitutionality,[54] the clear statement rule against federal abrogation of the states' Eleventh Amendment immunity,[55] the presumption against federal preemption or disruption of traditional state functions,[56] and the presumption against a waiver of the United States' sovereign immunity.[57]

C. Three Theorized Accounts

Given the distinction we embrace between language canons and substantive canons,[58] we analyze and discuss the two types of canon separately in Part III. In addition, we follow up on some of our results in Part IV by assessing the persuasiveness of three distinct theoretical approaches to describing or justifying the Court's canon reliance.

First, we address the explanatory model offered for the canons by public choice scholars Macey and Miller. We explore how majority authors invoke the language canons to resolve more technical statutory disputes in relatively nonideological statutory settings. We also consider whether these aspects of canon reliance are attributable to the Justices' lack of expertise or ideological investment, or are better explained by reference to other factors.

Second, we examine the pessimistic assertions by Ross and Rubin, among others, that the Court uses canons to undermine

---

54. *See, e.g.*, BE & K Constr. Co. v. NLRB, 536 U.S. 516, 535-36 (2002); Edward J. DeBartolo Corp. v. Fla Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575-78 (1988); NLRB v. Catholic Bishop, 440 U.S. 490, 499-501 (1979).

55. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73-77 (2000); Will v. Mich. Dep't of State Police, 491 U.S. 58, 65-67 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 245-46 (1985).

56. *See, e.g.*, Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 365, 387 (2002); Johnson v. Fankell, 520 U.S. 911, 918, 922 (1997); N.Y. State Conf. of Blue Cross/Blue Shield Plans v. Travelers Ins., 514 U.S. 645, 654-55, 661-62 (1995).

57. *See, e.g.*, Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 431-32 (1990); Lehman v. Nakshian, 453 U.S. 156, 160-61 (1981); United States v. Testan, 424 U.S. 392, 399-400 (1976). Guidelines or norms favoring deference to agency interpretation of statutes are not classified as substantive canons; judicial reliance on such norms is coded as "agency deference." *See infra* Part II.C.

58. There will, of course, be occasional difficulty in drawing lines at the edges between the two categories. We follow custom in referring to the Whole Act Rule as a language canon even though references to overall statutory structure and the need to avoid surplusage at times may implicate substance. Similarly, we classify the canon that repeals by implication are disfavored as substantive even though its policy promoting continuity between statutes may not seem terribly different from the *in pari materia* language canon's promotion of consistency between statutes. *But cf.* Morton v. Mancari, 417 U.S. 535, 548-50 (1974) (tying implied repeals to considerations of judicial respect for congressional intent and purpose). Still, the fundamental distinction is familiar and serviceable between canons that profess only to clarify the text (and therefore meaning) approved by Congress, and canons that promote judicially preferred policies.

discoverable legislative intent. Here, we focus on disagreements within the Court that reflect tensions between majority reliance on canons and dissent dependence on legislative history. In cases where such tension exists, is there a predictable ideological direction? If so, is this ideological tilt best understood by reference to the use of particular types of canons, to specific subject matter areas before the Court, or to the opinion-writing of certain Justices?

Finally, we consider the pragmatic claims made on behalf of the canons by modern scholars like Sunstein, Eskridge and Frickey, and Shapiro. In order to understand if the canons in fact function as "off-the-rack gap-filling rules" to promote interpretive continuity, we examine the extent to which their use can be deemed consistent and ideologically neutral. Particularly when both majority and dissenting opinions invoke the canons, we consider whether the Court's patterns of reliance enhance clarity and whether they serve as constraints on arbitrary judicial action.

II. ASSEMBLING AND ANALYZING A DATABASE

A. Identifying and Classifying Workplace Law Cases

Based on a review of Supreme Court decisions since the start of Chief Justice Burger's tenure in the Fall of 1969, we have identified 632 cases with published opinions that directly address some aspect of the employment relationship.[59] The cases were compiled initially through a series of searches in the Westlaw FLB-SCT database keyed to numerous titles and sections of the U.S. Code.[60] We also have relied on *U.S. Law Week* end-of-term summaries and on the annual review of Supreme Court labor and employment decisions, appearing in *The*

59. Our dataset includes all cases decided by written opinion (signed or per curiam) from December 1969 through June 2003, a span of 34 Supreme Court terms. It does not include opinions written as part of the initial disposition of a certiorari petition. It also does not include affirmances without opinion by an equally divided vote, as in Bd. of Educ. v. Nat'l Gay Task Force, 470 U.S. 903 (1985).

60. Brudney began this project in 2000, and he secured initial and updated lists with the skilled help of Brian Ray and Rebecca Frihart, research assistants and now graduates of The Ohio State University Moritz College of Law. A memorandum detailing the search methods used to generate initial case lists for 1969-1999 is on file with the authors. The search methods yielded far more than the current number of cases; Brudney's review of Westlaw summaries allowed him to eliminate cases citing the searched for code sections that did not directly involve the employment relationship. Selection of relevant cases required exercising only a minimal amount of discretionary judgment; the great majority of decisions were not "borderline."

Labor Lawyer since the 1983 term, to supplement and cross-check our electronic search.[61]

Our dataset focuses on controversies that affected employees in their status as employees. In almost all instances, these disputes implicated the relationship between employees and employers, unions and employers, or unions and employees. Occasionally, our cases feature workplace-related disputes that involved the government or another third party, as in decisions concerning the immigration effects or tax consequences of an employment-based event.[62] We have not included cases that may have employment law implications but do not themselves arise in the employment context. While some of these cases may have had a substantial impact on the subsequent direction of labor and employment law,[63] we found it more practicable—and less subjective—to classify based on the presence of a workplace nexus rather than the anticipated relevance of an education or voting rights or attorney's fees decision.

The 632 cases we have identified represent a remarkably stable portion of the Supreme Court's overall decision docket. To be sure, the number of workplace law decisions has fluctuated considerably between terms.[64] Still, measured in three year intervals, these decided cases have constituted roughly one-sixth of the Court's docket on a consistent basis since the mid 1970s.[65] It is notable that this

---

61. For cases decided in the past three terms, we have relied primarily on case reviews and summaries from *U.S. Law Week*. The annual review that appears in *The Labor Lawyer* is compiled and presented by the Secretary to the American Bar Association Section on Labor and Employment Law, a position occupied by different labor and employment law professors on an annually rotating basis.

62. *See, e.g.*, INS v. Nat'l Ctr. for Immigrants' Rights, 502 U.S. 183 (1991) (holding that agency regulation requiring release bonds for excludable aliens to contain "condition barring employment" pending deportability determination is valid exercise of statutory authority); United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001) (holding that salary-based damages paid to professional baseball players for employer misconduct occurring in previous years are taxable for the year the damages are actually paid).

63. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (addressing constitutionality of state-supported affirmative action programs); Hensley v. Eckerhart, 461 U.S. 424 (1983) (establishing standards for attorney's fee awards under civil rights laws); Alexander v. Sandoval, 532 U.S. 275 (2001) (deciding there is no private right of action to enforce disparate impact regulations under Title VI of Civil Rights Act).

64. The range is from a high of thirty-three in the 1981 Term to a low of seven in the 1999 Term. *See* James J. Brudney, *The Changing Complexion of Workplace Law: Labor and Employment Decisions of the Supreme Court's 1999-2000 Term*, 16 THE LAB. LAW. 151, 152-64 (2000) (providing overview of Court's workplace law docket from 1969-2000).

65. *See id.* at 152-53, (discussing workplace law ratio from 1969 through 1999 term). In the past three terms (2000 to 2002), the Court issued 226 signed or per curiam opinions deciding cases after oral argument. LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 82-84 tbl.2-11 (3d ed. 2003); 72 U.S. L.W. 3079 (July 15, 2003)

workplace law proportion has held steady even though the Court's overall number of decisions has plunged by over 50 percent since the early 1980s.[66] Moreover, the level of interest has persisted over nearly thirty years despite major social and economic developments outside the workplace, shifting ideological priorities among the Justices, and substantial changes in Justice Department and interest group litigation agendas. This impressive stability presumably reflects the enduring importance of work in our modern culture. It also indicates the Court's attentiveness to continuing efforts by Congress and the President to provide a range of legal protections for employees, while accommodating those redistributive preferences to certain privileges asserted by employers.

Federal law imposes a kind of structure on the American workplace through the large number of statutory and constitutional provisions that create and condition the enforceable rights of workers. For subject matter purposes, we have classified our 632 cases into eight main groupings. Seven of these categories cover claims related to various statutory schemes or provisions: (i) labor-management relations statutes;[67] (ii) race or sex discrimination provisions;[68] (iii) provisions involving other forms of status discrimination, such as age or disability;[69] (iv) laws creating minimum employment standards or compensation levels;[70] (v) retirement-related statutes;[71] (vi) general

(identifying number of majority opinions for 2002 term). Of these opinions, 42, or 18.6 percent, addressed workplace law matters.

66. *See* Brudney, *supra* note 64, at 152 (contrasting average of 153 decided cases per term in 1981-83 with average of 86 cases per term in 1996-99, a drop of 67, or 44 percent). The Court's average for the 2000, 2001, and 2002 terms has been 75 cases, a decrease of 51 percent from the 1981-83 average.

67. This category includes the National Labor Relations Act of 1935, the Labor-Management Relations Act of 1947, the Labor-Management Reporting and Disclosure Act of 1959, the Railway Labor Act, the Norris-LaGuardia Act, the Federal Service Labor Management Relations Act of 1978, and a smattering of other provisions that gave rise to labor-management or union-employee conflicts.

68. Such claims arose primarily under Title VII of the 1964 Civil Rights Act, but they also arose under the Equal Pay Act of 1963 and under the Civil War era statutes (42 U.S.C. §§ 1981, 1983, 1985). Race or sex discrimination cases implicating constitutional provisions (chiefly Fourteenth Amendment and Fifth Amendment) are covered here as well.

69. This category includes the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, the Civil War era statutes when invoked to allege discrimination based on factors other than race or sex, and statutes alleging discrimination against veterans.

70. This category includes the Fair Labor Standards Act (FLSA), the Longshore and Harbor Workers Compensation Act, the Occupational Safety and Health Act, and the Mine Safety and Healtb Act, as well as many other laws addressing basic terms and conditions of employment that arose only once or twice as the focus of Court decisions.

negligence-based provisions that apply mostly to workers in the railroad or maritime industries;[72] and (vii) miscellaneous employment-related provisions.[73] The eighth category consists of decisions that implicate provisions of the U.S. Constitution.[74] Within each of these eight workplace law areas, we have done additional coding based on the particular statutory scheme or constitutional provision involved.[75]

B. Coding Opinion Results and Individual Justices in Ideological Terms

Our effort to evaluate political neutrality or ideological direction is grounded in our coding of judicial outcomes. For all cases, we determined whether the Court's legal result favored employees or employers. In 90 percent of the cases this was a fairly straightforward process, because the interests of employees or unions as grievants were pitted against the interests of employers. Further, the employee or union sought to vindicate a congressionally provided or constitutionally conferred right, or the employer invoked a statutory defense or constitutional interest of its own, such that the outcome was readily classifiable as either pro-employee or pro-union—referred to here as liberal—or pro-employer—referred to as conservative.[76]

---

71. This category refers primarily to ERISA, but it also includes some cases applying specialized federal retirement statutes that affect civil service, railroad, coal industry, and military employees.

72. This grouping includes the Jones Act, the Federal Employers' Liability Act (FELA), the Federal Tort Claims Act, general admiralty law, and state tort law when applicable.

73. This most disparate category encompasses employment-related disputes that arise in connection with antitrust law, immigration law, criminal law, tax law, social security law, and various other areas.

74. Many of these cases present issues under the First Amendment or the Equal Protection or Due Process Clauses of tbe Fourteenth Amendment, although there also are decisions involving the Fourth, Seventh, Tenth, and Eleventh Amendments as well as other constitutional provisions. When a majority opinion involved interpretive reasoning that implicates both constitutional and federal statutory provisions (such as a First Amendment challenge to a federal statute regulating employer speech or union picketing), we included it in both subject matter categories. This occurred in about 9 percent of all cases (fifty-five total). Further, in about 2 percent of the cases (thirteen total), the Court analyzed two issues in distinct areas of federal workplace law (for example, the court took certiorari on and resolved both an NLRA and an ERISA issue); here again, we included the case in both subject matter categories. We did not double count tbese "two substantive category" cases in any other respect; they count as a single case when coding decision results and also when coding the opinions of individual Justices.

75. For example, a case decided in the area of labor-management relations will be further classified based on whether it involved the NLRA, LMRA, LMRDA, Norris-LaGuardia Act, etc. A copy of the Codebook identifying subject matter categories, including specific subcategories for each of our eight subject matter groupings, is on file with the authors.

76. We apply the terms "liberal" and "conservative" in this workplace and civil rights-related area of law and public policy; the terms may have a somewhat different connotation in other policy areas such as business regulation or international affairs. Employee-employer

Some 10 percent of the cases (sixty-seven total), however, were anomalous. These decisions either involved "reverse discrimination" issues in which a non-minority or a male employee asserted rights to equal treatment,[77] or they involved disputes between employees and unions in which individual workers alleged some form of union misconduct under a federal statute or the Constitution.[78] We coded the reverse discrimination decisions as liberal if the outcome favored the class or group that was the primary intended beneficiary of the statutory or constitutional provision.[79] For the disputes between individual employees and unions, we coded some cases based on ideological outcome but more often we were unable to identify the Court's decision as liberal or conservative given the nature of the conflicting interests.[80]

Besides coding judicial outcomes, we also identified each of the nineteen Justices who served during this period as either liberal or

---

conflicts typically involved disputes over employee claims for reinstatement or compensation under Title VII, the ADEA, other employee protection statutes, or even the Fourteenth Amendment. Union-employer conflicts regularly involved contests over union attempts to engage in organizing or collective bargaining under the NLRA, the RLA, or related statutes. Employers on occasion asserted their own rights, either as defenses to liability or as claims for compensation. *See, e.g.*, Employees of Dep't of Pub. Health of Mo. v. Dep't of Pub. Health of Mo., 411 U.S. 279, 285 (1973) (employer asserts successful sovereign immunity defense); Eastern Enters. v. Apfel, 524 U.S. 498, 536-37 (1998) (employer asserts successful claim under Fifth Amendment Takings Clause). In a very small number of cases, the Court's decision was sufficiently divided in outcome between employees and employers that we did not code the majority opinion as either liberal or conservative.

77. *See, e.g.*, United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Johnson v. Transp. Agency, Santa Clara, 480 U.S. 616 (1987). There are nine such cases.

78. *See, e.g.*, NLRB v. Boeing, 412 U.S. 67 (1973); United Steelworkers of America v. Sadlowski, 457 U.S. 102 (1982); Karahalios v. Nat'l Fed'n of Fed. Employees, 489 U.S. 527 (1989). There are fifty-eight such cases.

79. Thus, the *Weber*, 443 U.S. 193 (1979), and *Johnson*, 480 U.S. 616, outcomes are coded liberal because the Court ruled in favor of the interests of racial minorities and women, even thougb tbe individual white male employees in each case ended up as losing parties.

80. When individual rights were aligned with traditional civil rigbts-related concepts (such as individual employees alleging race or sex discrimination against the union or asserting a right to intervene in a lawsuit or to be certified as a class), we coded results as liberal (pro-employee) and conservative (pro-union). But when individual employee rights directly impinged on the rigbts of a union majority that had taken a democratically supported position (such as disciplining an individual for crossing a picket line in violation of the union constitution, or seeking to collect agency fees from bargaining unit members to support union-approved lobbying or organizing efforts), we concluded tbat the result did not line up in traditional liberal-conservative terms. Finally, there were a handful of cases in which the direct policy implications seemed to us too close to call (for example, is it "conservative" to prohibit punitive damages against a union? Is it "conservative" to allow a newly elected union president to discbarge appointed business agents who opposed him in the election?). In the end, we omitted 37 of the 58 union-employee conflict decisions from our ideological results coding. When combined witb the small number of decisions tbat were truly divided in outcome, *see supra* note 76, there are 48 out of 632 total decisions that are not coded for results in ideological terms.

conservative.[81] In making these determinations, we relied on voting scores derived from a data base compiled by Professor Harold Spaeth, whose work analyzing Supreme Court voting behavior is well recognized.[82] Several of Spaeth's designated policy areas, combined together, provide a distinctively formulated yet comparable subject matter category to our workplace law dataset.[83] Based on voting scores for those policy areas, we identify eight Justices as conservatives and eleven as liberal.[84] There is a close correlation

81. The nineteen Justices include five who served only on the Burger Court (Justices Burger, Black, Harlan, Douglas, and Stewart), six who served only on the Rehnquist Court (Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer), and eight whose tenure spans both eras (Justices Powell, Brennan, Marshall, White, Blackmun, O'Connor, Stevens, and Rehnquist).

82. *See* Computer file: Harold J. Spaeth, United States Supreme Court Judicial Database, 1953-2001 Terms (2001) (on file with producer, Mich. St. Univ. Dep't of Political Science); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 256-60 (1993).

83. We needed to obtain ideology scores for the Justices individually, and the Court as a whole, that were not endogenous to our dataset but that still captured the potential ideological differences between workplace law decisions and the aggregate of cases. We employ an ideology score derived from each Justice's votes through the 1999-2000 term (including votes prior to 1969) on a subgroup of issues in the Spaeth database. The issues include all civil rights issues (Issue variable codes in 200s and 300s), all union-related issues (Issue variable codes 553 to 599), and selected economic issues (Issue variable codes 601, 605, 611, 621, 631, and 636). The civil rights issues are modestly overinclusive in that they contain cases dealing with voting rights, education, and general poverty law as well as employment. The combined issue codes are also mildly underinclusive in that certain other issue codes represent policy areas (for example, First Amendment, due process, Federalism) that contain some employment-related subjects. Still, the Spaeth combination of issue codes has substantial overlap with our employment-based dataset, and in screening out a number of potentially distorting or conflating policy areas (such as criminal law, judicial power, natural resources), it provides a useful independent baseline for the ideological orientations of the Justices.

In recent years, political scientists have been experimenting with alternative ways of operationalizing judicial ideology. For examples of dynamic measures of the Justices' changing votes over time, using more sophisticated statistical methods, see Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002); Michael Bailey & Kelly H. Chang, *Comparing Presidents, Senators, and Justices: Interinstitutional Preference Estimation*, 17 J.L. ECON. & ORG. 477 (2001). These measures, however, are derived through the original Spaeth dataset, relying on vote scores that are still used regularly in the political science field. For our purposes, the newer measures are less than ideal, given their complicated methods and the fact that they are oriented toward the universe of all cases rather than a discrete subset of decisions. We do take account of the changing nature of workplace law subject matter over time, as well as changes in the approaches taken by individual Justices. *See, e.g., infra* tbls.III-VI and accompanying discussion.

84. Justices are coded as liberal or conservative by using simple directional analyses keyed to the proportion of liberal votes. The eight conservatives (Justices Harlan, Burger, Powell, O'Connor, Scalia, Kennedy, Thomas, and Rehnquist) voted for individuals (against employer, business, or government-related positions) less than 50 percent of the time; the other eleven Justices cast pro-individual employee votes in more than 50 percent of the cases. When relying on judicial classifications in our analyses, we focus primarily on five Rehnquist Court conservatives and eight long-serving liberals, with the six other Justices grouped in a reference

between voting behavior in our dataset and in the larger Spaeth collection of civil rights-unions-economic issues, although some differences exist between the two.[85]

With respect to ideological outcomes in our workplace law dataset, we found that the decisions over this thirty-four year period are quite evenly divided. Of the 584 cases for which we coded such outcomes,[86] 301 (51.5 percent) were liberal decisions while 283 (48.5 percent) were conservative. Although employees and unions fared

---

category. We also conduct similar analyses distinguishing conservative and liberal Justices simply based on the intensity of their Spaeth vote scores, grouping moderate-voting Justices (45-55 percent for employees) as our reference category. *See infra* tbls.X,XII and notes 197-198, 214.

85. The voting scores listed below reflect the percentage of cases in which a Justice cast votes favoring the legal position of individuals, employees, or unions; a score above 50 percent is characterized as liberal. We present vote scores based on the Spaeth issue codes, *see supra* note 83, side-by-side with scores based on our own dataset; we include in parenthesis the number of ideologically identified votes cast by each Justice.

	Spaeth Issue Codes	Brudney & Ditslear
Rehnquist	32.6% (1028)	37.5% (557)
Stevens	61.9% (849)	64.5% (488)
O'Connor	46.1% (581)	46.0% (376)
Scalia	30.2% (358)	40.9% (264)
Kennedy	38.4% (319)	47.2% (216)
Souter	64.1% (227)	60.0% (170)
Thomas	28.0% (194)	41.2% (148)
Ginsburg	65.8% (137)	62.0% (129)
Breyer	73.4% (120)	63.2% (114)
Blackmun	63.6% (965)	62.7% (450)
White	59.8% (1251)	52.2% (454)
Marshall	81.1% (991)	77.3% (423)
Brennan	78.1% (1315)	76.2% (408)
Powell	45.1% (707)	40.7% (307)
Burger	41.1% (754)	37.3% (319)
Stewart	54.3% (906)	45.8% (201)
Douglas	81.2% (760)	80.8% (78)
Black	74.0% (573)	71.4% (21)
Harlan	49.8% (543)	47.6% (21)

For thirteen of the nineteen Justices, there is less than a 5 percent difference between our voting scores and Spaeth's scores. For three Justices (Kennedy, White, Stewart) the difference is between 5 percent and 10 percent, and for three Justices (Scalia, Thomas, Breyer) it is between 10 percent and 15 percent. Only one of the nineteen Justices has a differential that changes his characterization: Justice Stewart's Spaeth "label" (liberal) is at odds with his voting record in our dataset.

86. *See supra* note 80.

slightly better before the Burger Court than they have before the Rehnquist Court, the difference is not significant.[87]

Several factors may contribute to this finding of broad-based ideological neutrality, which is somewhat at odds with the Court's conservative reputation in recent decades. First, given the higher likelihood that disputes will be litigated (as opposed to settled) in close cases, parties' win rates as a general matter may tend to be comparable over an extended period.[88] The prospects for such comparability are likely enhanced when the parties can present plausible legal contentions before an appellate court that exercises purely discretionary jurisdiction.[89]

Second, using individual case outcomes to report the Court's ideology does not account for the ambition or aspirations that underlie the cases being brought. Conservative Justices can appear more liberal if they accept and then resolve disputes in which pro-employee votes were relatively easy to cast.[90] In the labor relations and employment discrimination areas, the business community doubtless plays a larger role in presenting the Justices with "hard cases" than it did in the Warren Court years, or even the early Burger Court era. Conversely, the civil rights community's role during the Rehnquist era has been distinctly more subdued in this regard. Assuming, as is likely, that employers in recent decades have pushed the envelope of

---

87. In the Burger era, 53.9 percent of decisions were liberal while in the Rehnquist era it has been 48.7 percent; the difference is not statistically significant. The use of "significant" refers to results that are statistically significant using either the t-test or the z-test as appropriate based on the sample size. A t-test compares the mean of two samples or sets of data, controlling for the sample size, to determine whether the difference between the statistics could be due to chance. A result that is significant at the .05 level ($t \leq .05$) has no more than a 5 percent chance of occurring purely as coincidence. R. MARK SIRKIN, STATISTICS FOR THE SOCIAL SCIENCES 178-89 (1995). All statistical analyses in this Article are run using Stata Version 7. For further discussion of our use of t-tests and z-tests, *see infra* note 113.

88. George L. Priest & Benjamin Klein, *Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes*, 14 J. LEGAL STUD. 215, 218-19 (1985); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 190-91 (1987).

89. As a rough analogy, the *Harvard Law Review* reported that for the 1991 through 2001 terms, the Court decided a total of sixty-seven state criminal law cases, thirty-five won by the state government and thirty-two by the criminal defendant. These results are presented in Table III (Subject Matter of Dispositions with Full Opinions), found in the very back of issue one (the annual Supreme Court review issue) of volumes 106 through 116.

90. *See* Lawrence Baum, *Measuring Policy Changes in the Rehnquist Court*, 23 AM. POL. Q. 373 (1995) (concluding that the early Rehnquist Court's record of outcomes in civil liberties cases overstated support for civil liberties because the Court in this period increasingly accepted cases in which pro-civil liberties votes were relatively easy to cast). *See generally* Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988) (finding that Justices are significantly more likely to grant review when interest groups file amicus curiae briefs supporting certiorari).

what they view as a sympathetic Court, their win-loss rate is in part attributable to their having pursued a more ambitious agenda.

Finally, our aggregate outcome data do not measure the magnitude of Supreme Court decisions. For instance, by weighing a union loss in a major case the same as a union win in a minor case, our "box score" cannot assess the impact in policy terms of wins and losses over time.[91] One way to recognize the ambition and magnitude factors referred to here is by focusing on decisions in closer cases, as opposed to unanimous or near-unanimous decisions. We present some results under this approach in Part III below.

C. Coding Interpretive Reasoning in the Justices' Opinions

In order to examine the rationales for each written opinion in our dataset, we identified ten distinct interpretive resources on which the Court relied with some frequency.[92] These are as follows: (1) the

---

91. *Compare, e.g.*, Lechmere Inc. v. NLRB, 502 U.S. 527 (1992) (major conservative outcome, restricting nonemployees' access to employer premises during organizing drive), *with, e.g.*, Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781 (1996) (minor liberal outcome, reaffirming settled law regarding proper time during contract negotiation when employer may express good faith doubt as to union's continued majority status).

92. Brudney used four law student research assistants (RAs) over an eighteen-month period to code judicial reasoning in the first 622 cases. He worked with a fifth RA to code the 10 cases decided in the 2002 Term. To minimize the risk of subjective or inconsistent results, he gave each RA a memorandum on coding categories and judgments. He also assigned cases by term, with terms spaced at sufficient intervals so that the four principal RAs (each of whom reviewed between 114 and 198 cases) coded a sizeable number of cases decided in the 1970s, 1980s, and 1990s. This reduced the possibility that any individual coder would encounter a greater concentration of one form of reasoning that may have dominated a particular Justice's approach, or the Court's overall thinking, during a given period. For each case, an RA filled in a detailed coding sheet. Brudney then analyzed each case separately, and reviewed all coding sheets, proposing occasional revisions that were discussed with the RA on a case-by-case basis at weekly meetings. While Brudney made the final determinations, consensus was reached in virtually all instances. Copies of the memorandum on coding interpretive reasoning as well as the coding sheet are on file with the authors. The substance of the memorandum is incorporated into the Codebook, *see supra* note 75, also on file with the authors.

In order to check for intercoder reliability, we conducted Tau-B tests to compare the decisions made by each principal coder against the other three for all ten judicial reasoning variables. *See* J. Richard Landis & Gary G. Koch, *The Measurement of Observer Agreement for Categorical Data*, 33 BIOMETRICS 159 (1977). The Tau-B test evaluates whether there is a statistically significant difference in the mean score assigned by each coder against the other coders. The results indicate that with one minor exception, there are no significantly different codings on any variable. The exception involves the Supreme Court precedent variable (not a focus of this Article), which one of the coders was slightly less likely than the other three coders to count as either affirmatively probative or a determining factor.

Notwithstanding the safeguards taken, classification of judicial reasoning inevitably involves the exercise of discretionary judgment. We believe that our standardized approach and readiness to resolve all disagreements between coders on a case-by-case basis has made the coding process as objective as possible. While we have little doubt that another set of readers

meaning of the textual language, including related appeals to plain or ordinary meaning; (2) dictionaries; (3) language canons; (4) legislative history (including specific references to committee reports, floor debates, hearings, and the Framers' history for constitutional provisions); (5) legislative purpose (including general references to what Congress meant to accomplish, or the mischief aimed at, and policy justifications imputed generally to a statute or constitutional provision); (6) legislative inaction (including congressional silence after intervening Court decisions and also traditional appeals to "dogs that don't bark"); (7) Supreme Court precedent; (8) common law precedent (including the background status of common law at time of enactment and specifically applicable common law principles); (9) substantive canons; and (10) agency deference.[93]

When reviewing each majority opinion, we identified the interpretive resources being invoked and then determined whether a resource was (i) merely referenced without being relied upon, including resources mentioned as part of preliminary or background discussion and also resources distinguished as substantively unhelpful; (ii) relied upon as affirmatively probative to help the majority reach its result; or (iii) relied upon as "a" or "the" determining factor in the majority's reasoning process.[94] Virtually every opinion for the Court has at least two resources identified as either probative or determining, and the vast majority have three or

---

might apply our ten categories slightly differently in individual instances, we also believe that any such deviations would be minor and randomly distributed.

93. We omitted some items that were referred to only infrequently, such as law review articles, treatises, and amicus curiae briefs. Our classification scheme includes both similarities to and differences from approaches taken by other scholars. For examples of other approaches, see Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N. MEX. L. REV. 325 (2001).

There has been a recent upsurge of interest in attempting to analyze judicial reasoning from an empirical perspective. In addition to the articles by Professors Schachter and Schneider, see generally Lee Epstein et al., *Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code*, 13 WASH. U. J.L. & POL'Y 305 (2003); Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113 (2002); Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409 (2000); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1434-50, 1493-98 (1998). Our approach, identifying ten different interpretive resources, coding expressed reliance (rather than mere reference) for each of those ten resources, and linking that reliance to ideological outcomes, is especially ambitious.

94. We coded each resource as a 1, 2, or 3 based on degree of reliance; any resource not referred to at all in the analysis sections of an opinion was coded zero.

more resources so identified.[95] For purposes of this Article, we focus on resources that are either probative *or* determinative: in both instances the resource contributes in a meaningful way to the majority justification for its holding.[96]

We found that the most important, and at times difficult, distinction to make regarding degree of probative value was between reference and reliance. Majority opinions often invoke resources such as legislative purpose, canons, or agency deference when using these resources in essence as foils or strawmen, because the majority is dismissing the value ascribed to them by a lower court, or by a party's brief, or by a dissenting Justice. Although these resources are in one sense being discussed as appropriate reasoning assets, the opinion author has not relied on them as positive support for the argument that leads to the Court's holding. We concluded that focusing on an interpretive resource's integral role in the majority's affirmative reasoning process would allow us to cast the sharpest light on the Court's principled justification for its decision. Moreover, in order to examine the relationship between principled justifications for the Court's decisions and the ideological direction of those decisions, we needed to focus on resources that advanced the direction chosen by the majority.[97]

Two examples may be helpful at this point. In *Christensen v. Harris County*,[98] Justice Thomas's majority opinion relied on the meaning of the Fair Labor Standards Act text and on two language canons (*expressio unius* and the Whole Act Rule) to hold that an employer's restrictive compensatory time policy was lawful under the

95. Majority opinions relying on only one resource comprise fewer than 5 percent of the dataset; majority opinions relying on two resources comprise another 8 percent of the decisions. Many of these "low resource" opinions were unsigned: seventeen of the twenty-two per curiam majority opinions in our dataset relied on no more than two resources.

96. Under our coding scheme, there is considerable variation in the architecture of majority opinion reasoning. Many opinions contain multiple 2s hut no 3s, many others have one 3 and several 2s, and some majority opinions are coded with two 3s; the latter generally occurs when the Court must resolve two distinct subissues to reach its conclusion.

97. Ours is certainly not the only plausible methodological approach to coding judicial reasoning. Professor Schacter, analyzing decisions from a recent Supreme Court Term, distinguished between opinions that made substantive use of an interpretive resource—even if tbe opinion author derived no guidance from the resource she considered—and an author's mere citation of the resource when setting forth the procedural history of the case. Schacter, *supra* note 93, at 12-13. Schacter, however, was not coding judicial outcomes, and her substantive-procedural dichotomy does not distinguish between substantive uses of a resource that the opinion's author supports and substantive uses the author rejects as unpersuasive, inconclusive, or even incorrect. Because we seek to examine the relationsbip between judicial reasoning and judicial outcomes, we have focused on interpretive resources used to advance the outcome endorsed by the opinion author.

98. 529 U.S. 576 (2000).

FLSA.[99] Justice Thomas also considered the contention of petitioner employees and amicus United States that the Court should defer to a Labor Department opinion letter expressly prohibiting what the employer was doing, but he concluded that deference was not warranted.[100] We coded language meaning and language canons as probative elements of the majority's reasoning, but agency deference as a nonprobative reference.

Similarly, in *EEOC v. Waffle House, Inc.*,[101] Justice Stevens's majority opinion relied on the meaning of the Americans with Disabilities Act text, Supreme Court precedent, and legislative inaction to conclude that a mandatory arbitration agreement prohibiting an employee from seeking judicial remedies did not bar the EEOC from seeking the same victim-specific relief in court.[102] Justice Stevens considered arguments made by the lower court (and by Justice Thomas in dissent) that the purpose of the Federal Arbitration Act and the substantive canon favoring arbitration required a different result, but he found those arguments inapplicable or unpersuasive.[103] We identified language meaning, Supreme Court precedent, and legislative inaction as probative, while coding legislative purpose and substantive canons as merely referenced.

The coding distinctions we applied to 632 majority opinions also were used to identify the nature and extent of judicial reliance in 377 principal dissenting opinions that included an elaboration of reasons.[104] For opinions dissenting from a liberal majority, the outcome was, of course, identified as conservative.

D. Caveats Regarding the Dataset

Before proceeding to report on our results, it is worth noting certain limitations of our empirical approach. First, we address only a subset of the Supreme Court's overall decision docket in recent times.

---

99. *Id.* at 582-85.

100. *Id.* at 586-89.

101. 534 U.S. 279 (2002).

102. *Id.* at 286-98.

103. *Id.* at 293-96.

104. Of the 632 decisions, 252 were unanimous and three involved simply a statement of dissent. We did not code such dissenting statements. For the 377 decisions featuring one or more dissenting opinions, we focus here on the primary or principal dissent. *See infra* note 123 (describing method for identifying that dissent). We also coded concurring opinions that included an elaboration of reasons, but we do not discuss concurrences in this article. Opinions that both concurred and dissented were identified in that way, but are classified here as dissents and coded only for their dissenting rationales. Sixty-four of these partial dissents combined with 313 "pure" dissents produce the number in text.

Despite its stability, workplace law disputes constitute just one-sixth of the volume of Court cases. This area of public policy does involve well-defined competing interests, making it relatively easy to code outcomes on an employee versus employer scale. In addition, because Congress's broad legislative goals in the workplace law area have been essentially unidirectional (to augment employee protections and thereby improve terms and conditions of employment), it may be easier to analyze whether particular interpretive resources are associated with liberal (or conservative) outcomes than it would be for some other subject matter areas.[105] Still, it is quite possible that an effort to assess the role of the canons in a different substantive area of Supreme Court case law would tell a different story.[106]

Next, our dataset covers one discrete period in the long history of the Court. The methodology for interpreting statutes is in part dynamic, insofar as it reflects an ongoing, if inchoate, conversation between the judiciary and the two more political branches.[107] The Court's approach to its interpretive process may therefore be affected over time by external factors such as new appointments and the changing political composition of congressional majorities, and by internal adjustments in the Justices' expectations regarding the

105. The fact that Congress's goals have been essentially to promote employee rights and protections in the workplace does not mean they have been exclusively so. Provisions in the Taft-Hartley and Landrum Griffin Acts restricting employee rights to picket and union rights to impede commerce reflect legislative intent that was primarily conservative rather than liberal as we are using those terms. And complex regulatory statutes like ERISA reflect legislative compromises accommodating employer as well as employee interests. Nonetheless, statutes reviewed in this dataset have overwhelmingly sided with employees in resolving the recurring polarized conflict between employee and employer interests. By contrast, securities law can involve more complex tensions among different types of market participants (banks, accounting firms, investment companies, mutual funds, individual investors), and Congress has been less predictable in its policy orientation regarding the securities laws it has enacted. *See* Margaret V. Sachs, *Judge Friendly and the Law of Securities Regulation: The Creation of a Judicial Reputation*, 50 SMU L. REV. 777, 784-91 (1997) (discussing proregulation nature of 1933 Securities Act and 1934 Securities Exchange Act); Michael A. Perrino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 STAN. L. REV. 273, 280-98 (1998) (discussing antiregulation nature of 1995 Private Securities Litigation Reform Act); David M. Levine & Adam C. Pritchard, *The Securities Litigation Uniform Standards Act of 1998: The Sun Sets on California's Blue Sky Laws*, 54 BUS. LAW. 1, 3-4, 51-53 (1998) (discussing antiregulation nature of 1998 Securities Litigation Uniform Standards Act).

106. As noted below, the conservative tilt of substantive canon reliance is due in part to the recurring role of canons protecting the immunity of federal and state governments. By contrast, in the criminal law area, one might expect reliance on the rule of lenity to contribute to a more liberal set of outcomes associated with the substantive canons.

107. *See e.g.*, Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHIC. L. REV. 149 (2001) (arguing that interpretive change is due primarily to endogenous shifts in the expectations of legislators and judges, the two key sets of actors in our interpretive system); Ross, *supra* note 13, at 562 (discussing recurrent interpretive periods characterized by conservative judiciary at odds with a more liberal Congress).

legislative performance and capabilities of Congress.[108] Our period of thirty-four years allows for observation of some evolution in the Court's usage of canons, but our discussion of current and relatively recent practices provides for more of an in-depth or time-lapse snapshot than a prolonged historical perspective.

Further, we do not attempt to set priorities among the interpretive resources we identify as probative for each opinion. When a majority author relies on the canons, she may rely on only one other resource or on as many as five, and she may rely on the canons as modestly probative to advance her reasoning in one opinion while invoking them as central to her justification in a separate decision. Judicial reasoning is highly situation-specific, reflecting sensitivity to the novelty and difficulty of issues presented, the nature of divisions among the Justices, and at times even the Court's interest in educating the general public.[109] We concluded that any effort to rank the Court's multiple and often complementary justifications for its holdings would require judgments more subjective than we were prepared to make. Accordingly, we focus on the presence of expressed reliance, foregoing any attempt to titrate the relative weight of various resources that contribute to each majority opinion. Part IV presents extensive doctrinal analyses, offering a more qualitative assessment of the Court's reliance on canons in different circumstances.

Finally, our study seeks to examine which interpretive resources were used to justify the Court's decisions, not what actually accounts for each author's judicial behavior. As we suggested earlier, it would be difficult, if not impossible, to assess empirically the array of personal values, practical considerations, and principled reasons that motivates each individual Justice.[110] Nonetheless, our focus on

---

108. Textualist judges' disparaging view of the legislative process as systematically strategic and even manipulative has contributed to reduced reliance on legislative history by the Supreme Court. *See* Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. LEGIS. 369, 384-87 (1999); *see also* Vermeule, *supra* note 107, at 160-61 (arguing that members of Congress may respond to this devaluation by making legislative history more accurate, which would encourage future judges to use it more often).

109. *See* Mayer G. Freed & Daniel D. Polsby, *Race, Religion, and Public Policy*: Bob Jones University v. United States, 1983 SUP. CT. REV. 1, 20 (1983) (suggesting that Court in the *Bob Jones* decision was primarily speaking to newspapers and history books, not rigorously applying legal principles, when it held that racial discrimination violated the "public policy" embedded in the tax code). *See* Sisk et. al., *supra* note 93, at 1498-1500; Farber, *supra* note 93, at 1416-30.

110. *See supra* note 42 and accompanying text. Nor do we assess directly the impact of collegial decisionmaking, which may *inter alia* augment or temper the use of canons and other interpretive resources and may also affect the ideological component of judicial decisionmaking. *See generally* Harry T. Edwards, *The Effects of Collegiality on Judicial Decisionmaking*, 151 U. PA. L. REV. 1639 (2003). Judge Edwards, who expressly limits his discussion to appellate courts other than the Supreme Court, identifies collegiality as "a *process* that helps to create the

how the Court explains its results offers advantages in understanding the judicial reasoning process. The Court's justifications for its holdings are valuable in part because they furnish guidelines to lower courts, attorneys, and the legal academy regarding how justifications should be rendered in future cases. The Court's principled explanations also legitimate the judicial form of decisionmaking, which in turn contributes to the Court's acceptability to a broader public.

In sum, while the limitations of our dataset suggest a need for caution, they also offer grounds for confidence. Our extensive assessment of one resource used in judicial reasoning allows for new insights in both descriptive and normative terms. By focusing on whether the canons are favored across different time periods, in particular subject areas, or by individual Justices, we can shed considerable light on complex patterns of reliance within the contemporary Court. By examining possible relationships between reliance on these canons and ideological outcomes, we can evaluate the theoretical claims regarding ideological neutrality—and predictability or clarity—that have been vigorously promoted with respect to this interpretive resource.

III. RESULTS

A. Reliance on Canons and Other Interpretive Resources Over Time

We begin with our dataset of 632 workplace law decisions in which the Supreme Court issued reasoned majority opinions.[111] Table I reports the extent to which the Court relied on our ten interpretive resources to justify its holdings. For each resource, we report reliance as a proportion of the total number of majority decisions over the thirty-four Supreme Court terms. Table I also reports reliance based on the two distinct "eras" of the Court within this period: the 350

conditions for *principled* agreement." *Id.* at 1645 (emphasis in original). He regards collegiality as a qualitative filter rather than a quantitative variable, and he contends that it mitigates the ideological preferences of judges. *Id.* at 1661, 1689.

Although we do not attempt to incorporate collegial considerations as an explicit justifying factor, we do consider their possible impact in some of our explanatory discussion. *See infra* text accompanying notes 171-174, 181-182 (discussing possible change in reasoning approach by some Justices as result of collegial considerations); *see also* Linda Greenhouse, *The Court: Same Time Next Year, And Next Year,* N.Y. TIMES, Oct. 6, 2002, §4 (Week in Review), at 3 (discussing the Court's performance as a small interdependent group).

111. In twenty-two of these decisions (nine in the Burger Court and thirteen in the Rehnquist Court), the Court announced its holding and set forth its principal reasoning in a plurality opinion. We treat these plurality opinions as majorities for purposes of our analyses.

workplace law decisions issued by the Burger Court during seventeen terms from 1969 to 1985, and the 282 workplace law cases resolved by the Rehnquist Court in the seventeen terms from 1986 to 2002.

Table I: Reliance on Interpretive Resources Over Time (N = 632)

Resource	% of All Cases	% of Burger Court Cases	% of Rehnquist Court Cases
Textual Meaning*	55.1	49.1	62.4
Dictionaries*	3.5	1.4	6.0
Language Canons*	17.1	12.0	23.4
Legislative History*	38.1	46.6	27.7
Legislative Purpose*	81.2	86.9	74.1
Legislative Inaction	5.9	5.7	6.0
Supreme Court Precedent	82.8	80.3	85.8
Common Law Precedent*	11.9	9.4	14.9
Substantive Canons*	11.6	8.3	15.6
Agency Deference	16.8	17.1	16.3

*indicates t-test reveals a significant difference between Burger Court and Rehnquist Court reliance on same interpretive resource

Preliminarily, Table I provides a useful overview of how the Court has justified its workplace law decisions over this thirty-four year period. For instance, the Court relied on the inherent or plain meaning of the textual language (including related references to ordinary meaning) in 55.1 percent of all majority opinions,[112] while relying on dictionary definitions in only 3.5 percent of its decisions. Further, the Court's interest in these two resources has become stronger over time. Reliance on the textual meaning resource has increased from 49.1 percent of all decisions in the Burger Court era to 62.4 percent during the Rehnquist Court years, while reliance on the

112. Although it may seem counterintuitive for judges not to he relying on text as the starting point for their analyses virtually 100 percent of the time, the 55.1 percent figure for textual meaning reflects how often we found express reliance on the meaning of the words (not mere reference to textual provisions) to support or advance the actual holding.

dictionary has grown from 1.4 percent to 6.0 percent between the two eras. Each of these increases is significant in statistical terms.[113]

Two of our interpretive resources, Supreme Court precedent and legislative purpose, were used as justifications in more than four-fifths of all majority opinions, far exceeding reliance on any other reasoning approach. We believe that the Court's heavy dependence on its own previous case law is in large part attributable to ordinary or traditional skills of advocacy. Except in rare instances of complete novelty, the parties to a Supreme Court dispute will plausibly contend that some aspect of the Court's precedents supports their position, even if simply to reframe or subtly modify the general legal rule or standard being applied. In addition, the Court derives part of its legitimacy from wrapping new decisions in a mantle of consistency so as to blend the dual imperatives of stability and change. Invocation of precedent enhances public perceptions of a coherent legal system and of a judiciary that exercises limited powers, regardless of whether an identified line of prior decisions is dispositive or simply somewhat probative.[114] For these reasons, and perhaps others, it should not be surprising that the Court's reliance on its own precedent is a staple ingredient of its reasoning.

As for legislative purpose, our rather expansive definition of this category may account for the unusually heavy reliance that we observed. Unlike text, canons, or legislative history, a purposive approach does not require reference to particular provisions or maxims, or to specific documents in the legislative record. We gleaned the Court's reliance on legislative purpose from its articulation of justifications grounded in more open-ended terms or concepts, such as the policies or values that a statute was meant to protect,[115] or the

---

113. A t-test compares the mean of two samples or sets of data, controlling for the sample size where that sample size is relatively small (about twenty-five observations or less) to determine whether the difference could be due to chance (including the possibility of random error in sampling or coding). The z-test operates in the same manner as the t-test, except that the sample size is in excess of twenty-five observations. For the sake of convenience, we report all significance tests in Tables I through XI as t-tests ($t \leq .05$), recognizing that a different distribution (the z-distribution) is being employed for the larger samples. *See* MICHAEL A. MALEC, ESSENTIAL STATISTICS FOR SOCIAL RESEARCH 117-27 (2d ed. 1993). Stata Version 7 assumes the proper distribution (z versus t) based on sample size. *See supra* note 87 (explaining significance as measured by using t-test.).

114. *See* Barak, *supra* note 7, at 30-31 (emphasizing the importance of adhering to precedent whenever possible and making that adherence explicit in order to engender ongoing confidence in a stable and predictable legal order); ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923) (describing law's challenge of reconciling need for stability and need for change).

115. *See, e.g.*, Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 558-60 (1997) (relying on purposes of Jones Act coverage protection for seamen).

goals that Congress must have had in mind,[116] or even the absurd practical consequences that Congress must have wanted to avoid.[117] Although we focused on norms or policies expressly attributed by the Justices to Congress or to the legislative branch, the often hypothetical or inferential nature of such attributions inevitably broadened the domain of this reasoning approach.[118]

Table I also makes clear that the Court's pattern of reliance on interpretive resources changed markedly between the Burger and Rehnquist eras. In addition to its increased usage of textual meaning and dictionaries, the Rehnquist Court has shown a greater willingness to justify its decisions through language and substantive canons, as well as common law precedent. The increased value attributed to text, dictionaries, and language canons is consistent with perceptions among scholars and commentators that the Court has become more "textualist" in recent years.[119] Whether one considers such reliance a welcome return to genuinely authoritative resources or a disturbing obedience to linguistic formalism, the trend is both distinctive and ongoing.

Conversely, Table I reveals a diminished appetite on the Rehnquist Court for using legislative history or legislative purpose to explain and justify results. This decreased reliance parallels scholarly commentary discussing the Court's newfound skepticism as to the value or even coherence of "congressional intent" as a principled

---

116. *See, e.g.*, Pegram v. Herdrich, 530 U.S. 211, 231-34 (2000) (relying on purpose imputed to Congress with respect to scope of fiduciary status under ERISA); NLRB v. Bildisco & Bildisco, 465 U.S. 513, 529 (1984) (relying on purpose imputed to Congress in prescribing two separate types of bankruptcy proceedings).

117. *See, e.g.*, Albertson's Inc. v. Kirkingburg, 527 U.S. 555, 577-78 (1999) (reasoning that certain consequences of an ADA interpretation are so absurdly onerous that Congress must have wanted to avoid tbem); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 210-13, 219-20 (1985) (interpreting LMRA so as to avoid practical evisceration of its basic policies).

118. The inferential nature of some purposive attributions has been questioned in methodological terms from inside the Court. *See* Pub. Citizen v. Dept. of Justice, 491 U.S. 440, 472-74 (1989) (Kennedy, J., concurring in judgment) (sharply warning against risk that certain judicial predilections or background societal norms will be imputed as "congressional purpose" absent any evidence that Congress considered them). Nonetheless, some interpretive resources are easier to define than others. Legislative inaction and common law precedent also involved more generalized contours, although neither area was invoked nearly as often as legislative purpose. Because the Court regularly justified its conclusions by summoning purposive norms or policy considerations expressly linked to what Congress, the Act, the Framers, or the Constitution presumably meant, the legislative purpose category may have become something of a default for reasoning that was too expansive to be assigned to a more precisely defined category. At some future point, we may decide to subdivide this resource category in an effort to sharpen our coding approach.

119. *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1993); WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 157-88 (1999).

explanation for statutory meaning.[120] At the same time, the Rehnquist Court's increased reliance on substantive canons and common law precedent suggests more willingness to invoke policies or norms that reflect judicially expressed values.[121] That willingness may signify an emerging interest in resolving close interpretive questions by reference to judicially crafted policy preferences, as opposed to policies or norms derived from legislative sources.[122]

Our principal focus is on the canons, and Table II presents in more detail the changes over time in the Justices' reliance on this interpretive resource. Table II reports both language canon and substantive canon reliance at five year intervals, for majority opinions and also for primary dissenting opinions.[123]

---

120. *See* Koby, *supra* note 108, at 377-81, 395 (linking Scalia critique directly to diminished Court reliance since 1987). *See generally* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 425-29, 444-45 (1988).

121. Other scholars have remarked on this trend. *See* Schacter, *supra* note 93, at 19-31 (observing that during the 1996 Term, Justices regularly invoked wide array of judicially selected policy norms to help them explain or justify their statutory interpretation decisions); Mank, *supra* note 21, at 614-16 (criticizing the Court's readiness to rely on judicially created canons while undervaluing deference to agency interpretations and evidence of legislative intent).

122. *See* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 332-54 (2000) (describing a series of cases in which the Court struck down federal statutes because of perceived deficiencies in the formal legislative record); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 87-105 (2000) (arguing that recent Court decisions show less willingness by the Court to defer to Congress's judgment). Reliance on the three remaining variables—Supreme Court precedent, agency deference, and legislative inaction—has been relatively consistent between the Burger era and the Rehnquist period.

123. Although 40 percent of our 632 decisions do not include a dissenting opinion, there are 377 cases that include over 480 opinions dissenting at least in part from the Court's result. Working with a research assistant, Brudney identified primary dissents in almost all instances based on which dissent garnered the most votes or (in a tie) which dissent was of greatest length. For the five cases in which multiple dissents garnered equal support and were of comparable length, Brudney selected a primary dissent based on his judgment as to which opinion had the most elaborate or complex reasoning.

For our purposes, it was not necessary to report statistical significance in Table II, especially given the small number of observations for many subcategories. Significant difference in reliance on language and substantive canons between the Burger and Rehnquist eras has already been reported in Table I.

Table II: Reliance on Canons Over Time: Majorities (N = 632) and Primary Dissents (N = 377)

Terms	Language Canon Majority%	Language Canon Dissent%	Substantive Canon Majority%	Substantive Canon Dissent%
1969-73	8.2	5.9	5.5	5.9
1974-78	11.2	5.5	10.3	11.0
1979-83	14.2	12.5	6.3	8.8
1984-88	18.2	9.1	15.7	2.6
1989-93	28.6	18.9	19.0	18.9
1994-98	12.7	11.8	14.1	17.6
1999-02	34.7	24.0	10.2	24.0

With the exception of a brief period during the mid 1990s, Table II reflects a steady rise in the Justices' willingness to rely on language canons in majority opinions and a comparable upward trend for dissents as well. The increase in majority reliance began in the mid 1970s and has continued during the Rehnquist Court years, peaking at more than one-third of all majority opinions over the past four terms. Table I indicated that a majority opinion written in the Rehnquist Court era was twice as likely to rely on language canons as one authored in the Burger Court years. The same sharp increase is also evident when comparing the late Burger Court years with the very recent Rehnquist Court. During the 1983-85 terms, majority opinions relied on language canons 13.6 percent of the time, compared with 33.3 percent of the time in the 2000-02 terms.[124] As we will see when we examine patterns in the reasoning used by individual Justices, the Rehnquist Court's growing inclination to rely on language canons coincides with the ascendancy of Justices Scalia, Kennedy, and Thomas, who are among the heaviest users of language canons in their majority opinions.[125] In addition, Justices Brennan, Marshall, and White became substantially more reliant on language canons in majority opinions they authored after 1986.[126]

---

124. The difference is significant at z = .01. Data for year-by-year reliance, as well as individual case records coding judicial reasoning for all 632 cases, are on file with the authors.

125. By contrast, among Justices who served exclusively or almost exclusively on the Burger Court, Justices Powell and Stewart rarely invoked language canons as part of their majority reasoning. *See infra* tbl.V and accompanying discussion.

126. *See id.* With respect to primary dissents that rely on language canons, newer appointees Justices Scalia, Kennedy, and Thomas are again among the heaviest users. In

With respect to usage of substantive canons in majority opinions, the Court's reliance also doubled from the Burger years to the Rehnquist era (see Table I), although the trend as reflected in Table II was not as steady. Increased reliance first became apparent in the late 1970s, and it reached nearly one in five majority opinions during the early 1990s, before receding to roughly one-eighth of all majorities over the past seven terms.[127] As was true with regard to language canons, the Court's greater willingness to rely on substantive canons is associated with newer arrivals on the Court and also with changes among certain long-tenure Justices. Justice Souter and Justice O'Connor have made frequent use of substantive canons in their majority opinions.[128] In addition, Justices Stevens and White increased their reliance on substantive canons in majorities they authored from 1986 onward.[129]

The Court's growing reliance on both language canons and substantive canons stands in marked contrast to the declining influence of legislative history as an interpretive justification during this same period. While the overall decrease in reliance on legislative history between Burger and Rehnquist Court majority opinions is reflected in Table I, the decline since the late 1980s has been even more precipitous. In the five terms from 1984-88, the Court's majority opinions relied on legislative history 42.1 percent of the time; that figure dropped to 22.6 percent for the next five terms (1989-93) and has remained between 22 and 25 percent for the past decade.[130] The arrival of Justices Scalia and Thomas, who have been openly scornful of legislative history as a resource, accounts for a large part of this decline.[131] In addition, Justices Stevens and White relied considerably

---

addition, Justices Blackmun and Stevens relied substantially more often on language canons in their primary dissents authored from 1985 onward. Precise figures on primary dissents for individual Justices are on file with the authors.

127. The pattern for dissents relying on substantive canons is slightly different: the sharp increase in the early 1990s has been basically sustained over the past seven years.

128. *See infra* tbl.VI and accompanying discussion. Justice O'Connor served for five terms on the Burger Court, but she authored only five workplace law majority opinions during that time. By contrast, she has written forty-two workplace law majorities since 1986, and those forty-two constitute an even larger proportional contribution given the Court's shrinking docket in this period. Accordingly, for workplace law purposes, Justices O'Connor qualifies as one of the newer arrivals, along with the seven Justices appointed since 1986.

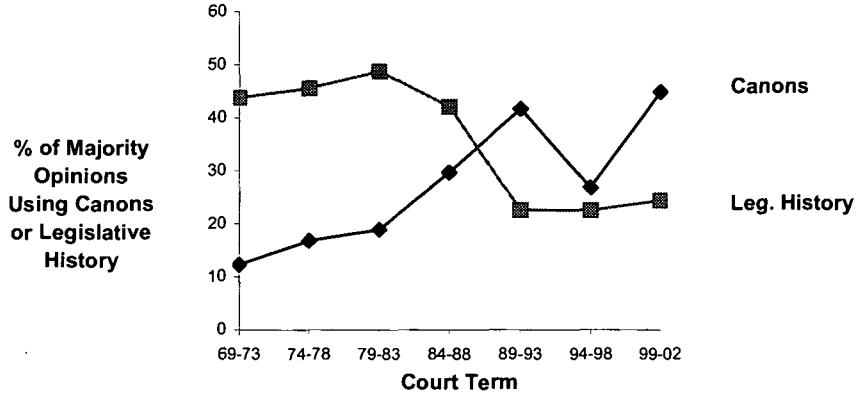
129. *See infra* tbl.VI and accompanying discussion.

130. The ratios, at five-year intervals since 1969, are as follows: 1969-73–43.8 percent; 1974-78–45.6 percent; 1979-83–48.8 percent; 1984-88–42.1 percent; 1989-93–22.6 percent; 1994-98–22.5 percent; 1999-2002–24.4 percent.

131. Justices Scalia and Thomas together have authored forty-seven majority opinions in the workplace law area, only one of which has relied on legislative history. For examples of the Justices' critical perspective on legislative history generally, see Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 616-23 (1991) (Scalia, J., concurring); Thunder Basin Coal Co. v. Reich, 510 U.S.

less often on legislative history in their majority opinions authored after 1986, and Justice Breyer has invoked that resource on a relatively infrequent basis.[132] Based on these and other changes, the graph below illustrates how the Court has moved over the past three-plus decades, from initially valuing legislative history far more than the canons to its present position of relying on the canons nearly twice as often as legislative history in its majority opinions.[133]

Trends in Reliance: Canons and Legislative History, Majority Opinions 1969-2003



B. Subject Matter and the Canons: Specialization Effects?

Variations in canon usage by the Court may be linked not only to changes in judicial personnel but also to the diverse subject matter composition of workplace law itself.[134] We noted earlier the Court's

200, 219 (1994) (Scalia and Thomas, JJ., concurring). *See also* SCALIA, *supra* note 10, at 29-37 (criticizing the use of legislative history to interpret statutes).

132. Justice Stevens's reliance has dropped from 48.3 percent in the Burger years to 25.8 percent in the Rehnquist era, while he authored virtually the same number of majority opinions in each period (twenty-nine in Burger era; thirty-one in Rehnquist era). Justice White's reliance declined from 53.1 percent in the Burger years to 17.6 percent during his Rehnquist Court tenure, although Justice White wrote far more majorities in the Burger years (forty-nine v. seventeen). Justice Breyer has relied on legislative history only 21.4 percent of the time, considerably below the 45.8 percent of Justice Blackmun, the Justice he replaced.

133. The numbers for canon reliance are slightly below the combined totals from columns one and three in Table II, due to the seventeen cases (decided over our thirty-four year period) in which the majority opinion relied on both language and substantive canons.

134. The variations we identified may also be related to changes in legal education, specifically an increase in attention to statutory interpretation and the role of canons in courses

relatively constant interest in labor and employment issues over the past thirty years.[135] Yet despite this steady general level of attention, the Court's specific subject matter priorities have shifted considerably during the course of three decades. From 1969 to the early 1980s, labor-management relations cases and race or sex discrimination cases together comprised over 70 percent of the Court's labor and employment decisions; that proportion had fallen to less than 30 percent by the early 1990s, and it has hovered at around 30 percent for the past decade.[136] The Court's more disparate diet of workplace law cases doubtless can be attributed to a range of legal and policy developments, notably including a proliferation of new federal employee protection laws since the late 1960s and substantial changes in the demographics and structure of the labor market over that same period.[137]

In recognition of the broad range of workplace-related subjects that now give rise to interpretive disputes, Tables III and IV present the Court's patterns of reliance on the canons across these distinct substantive law areas. Table III reports language canon reliance for our eight identified subject matter categories, calculated basically as a proportion of the total number of majority decisions in each category.[138] Table III further breaks down this language canon reliance into Burger Court and Rehnquist Court periods.

---

taught at many of the elite law schools that furnish law clerks for the Justices. *See infra* note 178 and accompanying text.

135. *See supra* notes 64-66 and accompanying text.

136. *See* Brudney, *supra* note 64, at 153-59 (documenting this shift in detail through 1999 Term). In the past three terms (2000-02), the Court has decided forty-two workplace law cases: twelve of these (28.6 percent) have involved either labor-management relations or race or sex discrimination, while the rest (71.4 percent) have addressed the assorted other workplace law categories identified at *supra* notes 69-74 and accompanying text.

137. Congress's newer enactments have been mostly in the areas of minimum standards, retirement and other fringe benefits, and age and disability discrimination. This increased reliance on government regulation as a preferred means of structuring the employment relationship has presented the Court with many new interpretive issues. Moreover, the new issues have generally arisen in the context of a gradually aging workforce, an expansion of contingent employment arrangements, and the periodic tremors of corporate downsizing. Each of these factors has contributed to real and perceived threats affecting job security, retirement eligibility, and health benefits among American workers. In addition, the sharp decline in union density and the resolution of major interpretive battles over the meaning of Title VII have diminished the urgency of litigation in the two areas that formerly commanded most of the Court's attention. Brudney, *supra* note 64, at 158.

138. As discussed, *supra* note 74, there are sixty-eight decisions in which the Court resolved issues in two or more distinct areas of federal workplace law that cut across our subject matter categories (for example, a case involving both NLRA and ERISA interpretation, or a case involving FLSA and Tenth Amendment interpretation). One of these cases involved the resolution of issues in three areas, while the other sixty-seven involved two subject matter categories. In an effort to reflect more accurately the interpretive resources relied on by the

Certain subject matter categories are associated with unusually high Court reliance on language canons. In particular, majority opinions interpreting minimum standards laws, ERISA and other retirement legislation, and miscellaneous statutes, made significantly more use of language canons to help justify their results when compared with the baseline rate of reliance.[139]

Table III: Reliance on Language Canons by Subject Matter Category and Over Time (N = 701)

Issue	Lang. Canon Majority% All Years	Lang. Canon Majority% Burger Years	Lang. Canon Majority% Rehnquist Years
All Cases (701)	15.4	10.9	21.0#
Labor Relations (192)	12.0	9.0	19.0#
Race & Sex Discrimination (135)	17.8	12.8	26.5#
General Discrimination (49)	18.4	26.7	14.7
Minimum Standards (70)	31.4*	24.2	37.8
Retirement (59)	32.2*	20.0	36.4
General Negligence (22)	4.5	0.0	5.6
Miscellaneous (42)	23.8*	20.0	27.3
Constitutional (132)	0.0*	0.0	0.0

*indicates t-test reveals significant difference in reliance for All Years between each issue area and all other issue areas

# indicates t-test reveals significant difference in reliance for a given issue area between Burger Court and Rehnquist Court

As Table III indicates, the Court's minimum standards decisions invoked language canons 31.4 percent of the time, compared to 15.4 percent for all workplace law decisions. Moreover, the noticeably higher level of reliance was evident in both Burger and

---

Court in these cases, we assigned each resource separately to whichever statutory or constitutional category was implicated by reliance on that resource. The result is an 11 percent increase in our universe of "decisions" (N=701) for Tables III and IV, but we believe this is acceptable in order to assure that judicial reasoning relied on to resolve a Tenth Amendment issue is not imputed to the FLSA category (or vice versa).

139. Significance results reported with an asterisk are for the All Years category, based on comparing canon usage in each issue area to the baseline of all cases minus that issue area. Significance results identified as "#" report changes in language canon usage for a particular issue area as between the Burger and Rehnquist eras.

Rehnquist Court years, and this heavier reliance also persisted through both periods for the retirement and miscellaneous categories.

By contrast, the Court's reliance on language canons in labor relations decisions and in race or sex discrimination decisions hovered around the baseline rate for all cases, although reliance in these two areas increased significantly between the Burger and Rehnquist eras. The Court's complete nonreliance on language canons in constitutional cases presumably reflects in large part the Justices' willingness to invoke policy-related justifications when interpreting what, for them and the legal community, are very familiar legal concepts. In addition, the canons have little to contribute to the comparatively straightforward linguistic structure of leading provisions such as the First, Fifth, and Fourteenth Amendments.[140]

Although we discuss the applicability of various theories in case-specific terms in Part IV, these subject matter results are intriguing from a public choice perspective. The Court's heavy reliance on language canons in the area of retirement legislation is consistent with the theory that such canons may serve in part as substitutes for more policy-oriented justifications. Controversies arising under ERISA and related federal retirement provisions present difficult and at times highly technical interpretive questions, and the Justices are less likely to approach such questions with the expertise or even the comfort level they may bring to more ideologically familiar areas such as race discrimination or labor-management relations.[141]

Within the minimum standards category, the Justices have relied heavily on language canons when construing safety and health legislation—either provisions that regulate technical safety and health standards[142] or disputes involving complex procedural or jurisdictional

140. Disputes involving these three amendments comprise over three-fourths of all constitutional decisions. Legislative purpose is invoked in 74.2 percent of majority opinions on constitutional issues, and Supreme Court precedent in 97 percent of them. The general negligence category, which contains a mere twenty-two cases over the thirty-four-year period, includes only one majority opinion that relies on language canons. Almost all of these cases (nineteen of twenty-two) were decided in the Rehnquist years, and the Justices relied heavily on Supreme Court and common law precedent as well as substantive canons when interpreting the Jones Act, the Federal Employees Liability Act, and admiralty law.

141. *See* Macey & Miller, *supra* note 11, at 658 (linking content-independent reasoning of plain meaning rule to more complex technical cases in 1989 Term). Some 85 percent of the cases in the retirement category (fifty of fifty-nine) involve interpretation of ERISA. Similarly, the Court's greater tendency to invoke language canons in the miscellaneous category is compatible with the Justices being infrequently exposed to these statutes in a workplace law setting and to the at times esoteric nature of the statutory provisions.

142. *See, e.g.*, Dole v. United Steelworkers of Am., 494 U.S. 26, 36, 38-39 (1990); Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 510-11, 513 (1981).

questions.[143] The Court also has frequently invoked these canons when construing the rather low-visibility statute that provides specialized protection for longshoremen and harbor workers.[144] Although the number of cases in each of these minimum standards subcategories is relatively small, this trend toward greater language canon usage in more technical or specialized statutes is broadly consistent with what we observed in the retirement category.

Also of interest is the Court's reliance on language canons in 21 of the 108 majority opinions that interpret the provisions of Title VII.[145] Unlike statutes such as the Coal Mine Safety Act or the LHWCA, Title VII disputes appear to present more accessibly policy-related controversies. From a public choice standpoint, it would seem plausible that the Justices relied less often on ostensibly content-neutral linguistic techniques to help justify their results in this "ideological battleground" area. Notably, we found that for 17 of the 21 majority opinions that *did* use language canons, the controversy before the Court could fairly be called procedural rather than substantive, and more technical than ideological. The Title VII decisions that relied on language canons mainly involved disputes over ancillary and specialized aspects of monetary relief,[146] contests regarding limitation periods and retroactivity,[147] and controversies

143. *See e.g.*, Thunder Basin Coal v. Reich, 510 U.S. 200, 208-9 (1994); Nat'l Indep. Coal Operators Ass'n. v. Kleppe, 423 U.S. 388, 398 (1976). In the fifteen cases requiring interpretation of OSHA, MSHA, or the Coal Mine Safety Act, the majority opinion relied on language canons seven times (46.7 percent). Omitting the four cases that involved constitutional challenges to an OSHA or MSHA provision, the percentage rises to 63.7 percent.

144. Five of the seventeen LHWCA decisions (29.4 percent) feature reliance on language canons. *See, e.g.*, Estate of Cowart v. Nicklos Drilling, 505 U.S. 469, 478-79 (1992); Morrison-Knudsen Constr. Co. v. Dir., Office of Workers' Comp. Programs, 461 U.S. 624, 633-34 (1983).

145. Title VII cases follow the Court's general trend regarding reliance on language canons in the race and sex discrimination issue area. The overall 20.4 percent ratio for Title VII majority opinions combines 13.4 percent of the sixty-seven Burger Court Title VII majorities with 31.7 percent of the forty-one Rehnquist Court majorities.

146. *See, e.g.*, Pollard v. E. I. DuPont de Nemours & Co., 532 U.S. 843 (2001) (deciding whether front pay awards are an element of compensatory charges); Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) (resolving whether employer can toll backpay by offering re-employment without retroactive seniority); N.Y. Gaslight Club Inc. v. Carey, 447 U.S. 54 (1980) (addressing entitlement to attorney fees for state administrative and judicial proceedings).

147. *See, e.g.*, Landsgraf v. USI Film Prods., 511 U.S. 244 (1994) (addressing retroactive application of new Title VII provision); EEOC v. Commercial Office Prod., 486 U.S. 107 (1988) (addressing timeliness under Title VII of a state law claim); Int'l Union Elec. Workers v. Robbins & Myers, 429 U.S. 229 (1976) (addressing deadline for filing claim).

focused on jurisdictional questions[148] or other procedural matters.[149] Thus, even with respect to perhaps the most ideological statute in the workplace law arena, the Court's use of language canons is associated with more technical aspects of the statutory scheme.[150]

With regard to substantive canons, Table IV reports reliance for the eight subject matter categories, again further subdivided based on the Burger Court and Rehnquist Court eras. In the retirement category, the Court's decisions rely more frequently on substantive canons, just as they more often made use of language canons in that area. The Court's reliance on substantive canons in race or sex discrimination decisions is right around its baseline rate of reliance for all cases; this too is similar to the Court's pattern with respect to language canons.[151]

148. *See, e.g.*, Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820 (1990) (addressing state court jurisdiction over Title VII claims); Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (resolving whether district court order was an appealable final decision).

149. *See, e.g.*, Rohinson v. Shell Oil, 519 U.S. 337 (1997) (addressing whether anti-retaliation provision covers former as well as current employees); EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981) (resolving whether agency is permitted to disclose information in government files to charging parties).

150. There are Title VII cases in which reliance on language canons is part of a majority opinion resolving a more obviously substantive and policy-related dispute. *See, e.g.*, Harris v. Forklift Sys., 510 U.S. 17 (1993) (refining liability standard for hostile environment sexual harassment claims); Hishon v. King & Spalding, 467 U.S. 69 (1984) (holding that business partnership decisions are covered hy Title VII); Morton v. Mancari, 417 U.S. 535 (1974) (reconciling Title VII antidiscrimination standards with preference for Native Americans in Indian Reorganization Act).

151. The rate of reliance on substantive canons for labor relations decisions is significantly lower than for the baseline of all other decisions. As in Table III, significance results are reported in two contexts: comparing canon usage in each issue area to the baseline of all cases minus that issue area, and comparing canon usage in a particular issue area as between the Burger and Rehnquist eras. For explanation of why "N" is 701 rather than 632 for Table IV, see *supra* note 138.

Table IV: Reliance on Substantive Canons by Subject Matter Category and Over Time (N = 701)

Issue	Subst. Canon Majority% All Years	Subst. Canon Majority% Burger Years	Subst. Canon Majority% Rehnquist Years
All Cases (701)	11.7	8.0	16.1#
Labor Relations (192)	6.3*	5.2	8.6
Race & Sex Discrimination (135)	10.4	4.7	20.4#
General Discrimination (49)	16.3	20.0	14.7
Minimum Standards (70)	5.7	6.1	5.4
Retirement (59)	22.0*	20.0	22.7
General Negligence (22)	18.2	0.0	22.2
Miscellaneous (42)	19.0	25.0	13.6
Constitutional (132)	14.4	8.8	19.4#

*indicates t-test reveals significant difference in reliance for All Years between each issue area and all other issue areas

#indicates t-test reveals significant difference in reliance for a given issue area between Burger Court and Rehnquist Court

On the other hand, the Court uses substantive canons less often in its minimum standards decisions, an area in which the Court has relied heavily on language canons. Further, the Court's more regular usage of substantive canons in the constitutional category represents a striking contrast with its practice of total nonreliance on language canons in that subject matter area. Given that substantive canons generally express policy preferences—including preferences linked to perceived constitutional norms or values—it is not surprising that the Court finds them more useful than language canons when resolving constitutional controversies.

Because substantive canons tend to reflect judicial policy preferences, the ways in which they are used over a period of time may be linked more to the policy implications of individual canons than to the statutory subject matter category in which they arise. For example, one might expect that canons favoring a particular policy position, such as respect for federalism and state sovereignty, might be invoked more often during periods when that policy position is shared by a majority of the Justices. Conversely, for canons that are

less explicitly policy-oriented but instead may relate more to structural or legislative process norms, such as avoiding constitutional issues[152] or disfavoring repeals by implication, one might surmise that the patterns of reliance would be relatively steady or continuous.

Our results on the most frequently invoked substantive canons tend to support this expectation. The Court has relied in eleven majority opinions on some version of what we call an "anti-preemption" canon, presuming that absent explicit statutory language, federal law should be understood not to interfere with traditional or core state functions. Ten of those eleven opinions have been handed down since 1984,[153] which corresponds generally to the time when the Court has staked out a distinctive position supportive of states' rights and suspicious in constitutional terms of federal regulatory encroachment.[154] A related though distinct federalism canon requires unmistakably clear federal statutory language in order to abrogate the states' Eleventh Amendment immunity from lawsuits in federal courts. Seven of the eight majority opinions relying on this canon were issued from 1985 onward.[155]

The pattern of reliance is more continuous, however, with respect to substantive canons that on their face seem less ideologically oriented. Thus, the Court on twelve occasions has relied on the canon of construing statutes restrictively in order to avoid possible or likely constitutional problems: seven of those decisions were handed down in the Burger era while five were issued during the Rehnquist years.[156] Likewise, the Court in seven instances has relied on the presumption

---

152. There is considerable controversy over whether the avoidance canon is ideological or predictably hostile to congressional intent. *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, & the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1573-1601 (2000). We report on empirical results with respect to the ideological direction for this canon at note 196 and accompanying text, *infra*.

153. The ten were decided in 1984, 1985, 1988, 1989 (2), 1995, 1997 (3), and 2002. The eleventh was decided in 1979.

154. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997) (limiting Congress's authority to "commandeer" state executive branch officials into the federal regulatory process); United States v. Lopez, 514 U.S. 549 (1995) (limiting Congress's regulatory authority under Commerce Clause); New York v. United States, 505 U.S. 144 (1992) (limiting Congress's authority to commandeer state legislative processes as part of federal regulatory effort).

155. *See* Raygor v. Regents of Univ. of Minn., 534 U.S. 533 (2002); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Gregory v. Ashcroft, 501 U.S. 452 (1991); Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990); Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989); Welch v. State Dept. of Highways, 483 U.S. 468 (1987); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985). The eighth case was Employees of Dep't of Pub. Health of Mo. v. Dep't of Pub. Health of Mo., 411 U.S. 279 (1973).

156. The seven Burger Court cases were decided in 1974, 1976, 1978, 1979, 1980, 1981, and 1984; the five Rehnquist Court decisions were issued in 1988, 1993, 1995, 1997, and 2002.

disfavoring implied repeals by Congress: three during the Burger years and four in the Rehnquist era.[157]

C. *The Justices and the Canons: Individual Variations in Usage*

In addition to reviewing the Court's reliance on canons over time and by subject matter, we also examined how individual Justices made use of canons in their majority opinions. Authoring an opinion for the Court is hardly an exercise in free will. Majority opinions typically are assigned by the Chief Justice based on criteria that go well beyond the assignee's desire to take on the task.[158] In addition, the contours of the opinion will likely be shaped to some extent by the litigants' contentions in their briefs and at oral argument, and by the rationales the Justices discuss at conference.[159] Still, the Justices do retain discretion as to how they will present justifications for the results reached, so long as they can hold onto at least four other votes. Thus, it is not surprising that we found considerable variation in the Justices' individual willingness to rely on either language or substantive canons.[160]

Table V reports individual Justices' reliance on language canons in their majority opinions, listing each Justice's total number

157. The three Burger Court decisions came down in 1974, 1981, and 1982; the four Rehnquist Court cases were decided in 1987 (2), 1991, and 2003.

158. Assignments (including self-assignments) may be used to further the policy goals of the Chief Justice or the senior associate Justice making the assignment. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 64-65 (1979) (discussing how Chief Justice Burger used assignment power to influence the scope of majority opinions in some areas of law). The assignment power also is used to meet the Court's institutional needs, such as equalizing workload, enhancing efficiency through issue specialization among the Justices, or solidifying a majority coalition in a closely divided case. *See* SEGAL & SPAETH, *supra* note 82 at 261-75; Forrest Maltzman & Paul J. Wahlbeck, *May it Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AM. J. POL. SCI. 421 (1996).

159. *See* HENRY J. ABRAHAM, THE JUDICIAL PROCESS 207 (4th ed. 1980) (quoting Justice Powell's observation that his initial views on an argued case were "not infrequently" altered through discussion at Conference); WOODWARD & ARMSTRONG, *supra* note 158, at 308-10 (describing fluid dynamic during Conference on a controversial case).

160. It seems reasonable to believe that the parameters set by briefs, oral argument, and conference discussion are equally constraining, or tractable, for each Justice who authors a majority opinion. Opinion assignments, by contrast, are concentrated in fewer hands: in our 34-year period this was primarily the two Chief Justices, and presumably also Justices Brennan and Stevens as recurrent senior members of majorities that did not include the Chief Justice. Still, choice among reasoning approaches would not seem to be a determining or even influential factor when exercising this assignment power. As indicated in Table V, one of the Chief Justices was a high user of language canons while the other has been a relatively low user.

of majority opinions as well.[161] We have arranged the nineteen Justices who served between 1969 and 2003 based on frequency of their language canons usage, starting with high users. For Justices whose tenure spans both the Burger and Rehnquist Courts, we also report reliance separately for each period.

Table V: Reliance on Language Canons by Individual Justices Over Time (N = 610)

Justice	Lang. Canon% All Years	Lang. Canon% Burger Years	Lang. Canon% Rehnquist Years
Thomas (20)	45.0*	N/A	—
Scalia (27)	33.3*	N/A	—
Stevens (60)	30.0*	31.0	29.0
Burger (17)	29.4	—	N/A
Blackmun (48)	29.2*	32.1	25.0
Breyer (14)	28.6	N/A	—
Ginsburg (11)	27.3	N/A	—
Harlan (4)	25.0	—	N/A
Black (4)	25.0	—	N/A
Kennedy (25)	24.0	N/A	—
Souter (20)	15.0	N/A	—
Brennan (69)	13.0	5.6	40.0
Rehnquist (47)	12.8	12.5	13.3
Marshall (53)	11.3	5.4	25.0
O'Connor (47)	10.6	20.0	9.5
Stewart (33)	9.1	—	N/A
White (66)	6.1*	4.1	11.8
Powell (36)	5.6	6.1	0.0
Douglas (9)	0.0	—	N/A

*indicates t-test reveals a significant difference between each Justice's reliance and reliance in decisions authored by all other Justices

Among Justices who have authored twenty or more workplace law majority opinions, the four most frequent users are two conservatives, Justices Thomas and Scalia, and two liberals, Justices Stevens and Blackmun.[162] At first glance, this allocation might seem

161. Because the Court issued 22 per curiam opinions, the total number of majority opinions authored by named Justices is 610.

162. Each of these Justices relied on language canons significantly more often than the baseline of all majority opinions minus those authored by that Justice. Other Justices with relatively bigh rates of reliance (Burger, Breyer, Ginsburg) have authored fewer majorities; their

to indicate that language canons are comparably valued by Justices of distinct ideological perspectives. In looking at these four Justices' reliance on other interpretive resources in their language canon decisions, however, a more complicated picture emerges. Justices Thomas and Scalia have each authored nine majority opinions that rely on language canons. Of those eighteen opinions, not one relies on legislative history, and only six rely on legislative purpose, a proportion that is far below legislative purpose reliance for all decisions during the Rehnquist Court years.[163] By contrast, of the thirty-two majority opinions authored by Justices Stevens and Blackmun that rely on language canons, nineteen also rely on legislative history while twenty-five rely on legislative purpose.[164]

What accounts for the striking disparities in how these four Justices have used language canons in relation to interpretive resources that are traditionally associated with specific congressional intent or legislative policy preferences? In our view, such disparities likely reflect serious disagreement as to the appropriate hierarchy of legitimate justifications for judicial decisions interpreting a statutory scheme or provision. For Justices Scalia and Thomas, the statutory text is not only the most authoritative source of meaning, it should be the exclusive source whenever possible.[165] Accordingly, language canons are a primary resource, used to extend and deepen textual analysis, as part of a nuanced linguistic approach that may also rely on dictionaries[166] and on the Court's own precedents construing identical or comparable language provisions.

Justices Stevens and Blackmun take a more traditional legal process-oriented approach to the interpretation of statutes. In searching for and relying upon evidence of what Congress specifically had in mind, or what it must have meant from a policy standpoint,

---

reliance did not differ significantly from the baseline. By contrast, Justice White was significantly *less* likely than his colleagues to rely on language canons in his majority opinions.

163. Justice Thomas's nine majority opinions include four that make use of legislative purpose in some way; Justice Scalia's nine majority opinions include two such decisions.

164. Justice Stevens authored eighteen majority opinions making use of language canons; he relied on legislative history in eleven of them, and in legislative purpose in thirteen. Of Justice Blackmun's fourteen majority opinions relying on language canons, eight relied on legislative history and twelve on legislative purpose.

165. *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 516, 518-19 (1993) (Scalia, J., concurring); Reves v. Ernst & Young, 507 U.S. 170, 172 n.1 (1993); Blanchard v. Bergeron, 489 U.S. 87, 97-99 (1989) (Scalia, J., concurring).

166. The 18 majority opinions by Justices Scalia and Thomas relied twice (11.1 percent) on dictionaries, well above the norm of 3.5 percent. Justices Thomas and Scalia generally rely on dictionaries much more than the Rehnquist Court norm—7 of 32 total majority reliances since the 1993 Term (Thomas 2 of 18; Scalia 5 of 14) constitutes together 22 percent, compared to 7.8 percent (8 of 103 majorities) for all other Justices during the same time period.

these Justices do not view the text and accompanying linguistic tools of textual elaboration as the final word. Legislative history and purpose will often be used to confirm what the text seems to mean,[167] and on occasion will be relied upon to supersede that apparent meaning,[168] but under either approach these contextual resources play a positive role in justifying results reached by the Court. In this setting, language canons are more supplemental than primary, serving as part of a broader web of resources that allows the Court to derive interpretive value from historical and practical context as well as literal text.[169]

To illustrate this basic distinction in types of reliance, an Appendix summarizes four majority opinions, one authored by each of the aforementioned Justices.[170] These four examples are not meant to suggest that language canons are always relied upon in one way by textualists such as Justices Thomas or Scalia and in a different way by legal process advocates like Justices Stevens or Blackmun. They are, however, indicative of a basic difference in terms of how language canons are integrated with certain other interpretive resources.

Apart from our comparisons among the most frequent users, Table V also reveals interesting variations in language canon reliance among the six Justices who made substantial contributions to workplace law during both the Burger and Rehnquist Court periods.[171] Three of these Justices—Justices Stevens, Blackmun, and Rehnquist—remained relatively constant in their use of language

---

167. *See, e.g.*, Bd. of Educ. v. Harris, 444 U.S. 130, 143-46 (1979) (Blackmun majority opinion relying on legislative history as confirming textual analysis); Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 209-12 (1994) (same); Mohasco Corp. v. Silver, 447 U.S. 807, 818-22 (1980) (Stevens majority opinion relying on legislative history to support that text means what it says); Massachusetts v. Morash, 490 U.S. 107, 115 (1989) (Stevens majority opinion relying on congressional purpose to reinforce and strengthen textual analysis).

168. *See, e.g.*, W. Va. Univ. Hosp. v. Casey 499 U.S. 83, 108-15 (1991) (Stevens, J., dissenting); Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 276-77 (1996) (Stevens, J., concurring).

169. It is worth noting that Justices Scalia and Thomas rely on fewer interpretive resources to explain or justify their results. The eighteen Scalia and Thomas majorities average 2.4 resources per opinion (Thomas 2.22; Scalia 2.67), while the thirty-two Stevens and Blackmun majorities average 3.6 resources per opinion (Stevens 3.6; Blackmun 3.6). Thus, the substantially greater Stevens-Blackmun reliance on legislative history and purpose does not appear to be a substitute for some other resources.

170. We do not maintain that these opinions are "representative" of each Justice's overall output in any mathematical sense. Still, we believe they help illuminate why aggregate differences exist.

171. Our measure of substantiality is solely quantitative, based on authoring at least fifteen majority opinions in each period. Justice O'Connor authored only five majorities in the Burger years, and Justice Powell wrote only three majorities in the Rehnquist era; accordingly, they are not included in this discussion.

canons between the two eras.[172] The other three, however—Justices Brennan, Marshall, and White—made much heavier use of language canons in their Rehnquist era majority opinions than they had during the Burger years.[173] These increases occurred during the same period when the Court's workplace law docket was becoming notably more diverse and less dependent on labor relations and race or sex discrimination cases,[174] and it is plausible to believe that subject matter shifts contributed to the three Justices' greater propensity to invoke language canons.

Yet, the cumulative impact of a five-fold increase in reliance for three Justices who had been among the lowest users of language canons[175] suggests that other factors were at work as well. One possibility is that the new arrivals exerted a subtle but important influence on the Court's methodological culture. By relying more often, and more prominently, on language canons as part of their linguistic approach to judicial reasoning, Justices Scalia and Kennedy elevated the status and role of this assertedly content-neutral resource.[176] Justices Brennan, Marshall, and White may therefore have come to regard analysis using language canons as more important, and—perhaps subconsciously—as an approach that would be valuable in order to attract or retain the allegiance of their newer colleagues.[177] An additional factor may be the influence of legal

---

172. Justice Stevens used language canons in 31.0 percent of his Burger Court majorities and 29.0 percent of Rehnquist Court majorities; for Justice Blackmun, the corresponding proportions are 32.1 percent (Burger) and 25.0 percent (Rehnquist) while for Justice Rehnquist they are 12.5 percent (Burger) and 13.3 percent (Rehnquist).

173. The increase was most dramatic for Justice Brennan, whose rate of reliance rose from 5.6 percent (Burger) to 40 percent (Rehnquist). Justice Marshall went from 5.4 percent to 25 percent, while Justice White moved from 4.1 percent to 11.8 percent. The increases between eras were significant, using the t-test, for Justices Brennan ($t \leq .01$) and Marshall ($t = .03$), while the increase for Justice White was not significant ($t = .12$).

174. *See supra* notes 136-137 and accompanying text (describing subject matter shift and suggesting possible explanations for its occurrence).

175. Taking Justices Brennan, Marshall, and White together, language canon reliance in their majority opinions soared from 5.0 percent (7 of 140 majority opinions authored from 1969 to 1986) to 25.0 percent (12 of 48 majorities authored from 1987 to 1992).

176. *See, e.g.*, Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117, 129 (1991) (Kennedy, J.); Fort Stewart Schs. v. Fed. Labor Relations Auth., 495 U.S. 641, 645-46 (1990) (Scalia, J.); Pub. Employees Ret. Sys. of Ohio v. Betts, 492 U.S. 158, 176-77 (1989) (Kennedy, J.). There is no reason to believe that Justices Scalia and Kennedy confined their reliance on language canons to the workplace law area; to the contrary, Justice Scalia has promoted such reliance in more general terms. SCALIA, *supra* note 10, at 25-27.

177. Because Justices Stevens and Blackmun had regularly relied on language canons in their Burger Court majorities, the arrival of others who favored their use would presumably not have had the same effect. The combined effect of these two holdovers plus the arrival of Justices Scalia and Kennedy may, however, have helped sharpen Justices Brennan, Marshall, and White's awareness of their increasingly anomalous status on this score. Justice Thomas may

education. In the mid to late 1980s, elite law schools began devoting increased attention to the subject of statutory interpretation, and law school graduates who clerked for the Justices may have brought with them a more conscious appreciation for linguistic analysis as a key element of judicial reasoning.[178]

With respect to substantive canons, Table VI reports individual Justices' reliance, again arranging the nineteen Justices starting with those who most often make use of substantive canons in their majority opinions. The eight Justices who served on both the Burger and Rehnquist Courts have their rates of reliance identified separately for each era.

---

also have contributed to Justice White's increased willingness to use language canons, but he could not have affected Justices Brennan or Marshall, as he arrived after their departure.

Apart from pure (or even strategic) collegiality considerations, regard for principles of argumentation also may have been at work. Because more Justices were resorting more often to language canon arguments, Justices Brennan, Marshall and White may have felt increasingly obligated to answer them in like terms.

178. Professors William Eskridge and Philip Frickey published a casebook on Legislation in the fall of 1987 that stimulated considerable new interest in teaching the subject of statutory interpretation. *See generally* Richard A. Posner, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy*, 74 VA. L. REV. 1567 (1988) (book review). Although sales figures for the first edition of the casebook are no longer retrievable, Professors Eskridge and Frickey report that courses using their materials (in draft or final form) were taught starting in the mid 1980s at Chicago, Michigan, Yale, and Berkeley law schools, and perhaps other top-ranked schools as well. *See* Email from William Eskridge to James Brudney, (June 9, 2004); Email from Philip Frickey to James Brudney (June 9, 2004) (on file with the authors).

Table VI: Reliance on Substantive Canons by Individual Justices Over Time (N = 610)

Justice	Subst. Canon% All Years	Subst. Canon% Burger Years	Subst. Canon% Rehnquist Years
Souter (20)	30.0*	N/A	—
O'Connor (47)	25.5*	40.0	23.8
Stevens (60)	18.3	6.9	29.0
Blackmun (48)	16.7	17.9	15.0
Rehnquist (47)	14.9	12.5	20.0
White (66)	12.1	8.2	23.5
Kennedy (25)	12.0	N/A	—
Burger (17)	11.8	—	N/A
Douglas (9)	11.1	—	N/A
Thomas (20)	10.0	N/A	—
Ginsburg (11)	9.1	N/A	—
Powell (36)	8.3	6.1	33.3
Marshall (53)	7.5	8.1	6.3
Breyer (14)	7.1	N/A	—
Brennan (69)	4.3*	5.6	0.0
Stewart (33)	3.0	—	N/A
Scalia (27)	0.0	N/A	—
Harlan (4)	0.0	—	N/A
Black (4)	0.0	—	N/A

*indicates t-test reveals a significant difference between each Justice's reliance and reliance in decisions authored by all other Justices

Focusing on the Justices who have authored twenty or more majority opinions, we see that two relatively frequent users of substantive canons—Justices Stevens and Blackmun—also relied heavily on language canons. The heaviest users of substantive canons in this group, Justices Souter and O'Connor,[179] were slightly below the Court average in their reliance on language canons. Moreover, the two most regular users of language canons, Justices Scalia and Thomas, rank much lower in their willingness to make use of substantive canons. For Justice Scalia, the contrast is especially stark: of his twenty-seven majority opinions, nine rely on language canons as part of their reasoning while not a single one makes use of

179. These two Justices are the only ones whose reliance on substantive canons is significantly above the reliance by Justices in all other opinions.

substantive canons. This difference is consistent with Justice Scalia's stated philosophy of interpretation set forth in his Tanner Lectures, where he extolled the commonsense and content-neutral virtues of the language canons while doubting the legitimacy of more substantive "dice-loading rules."[180]

As was true for language canons, the sharp increase in use of substantive canons between the Burger and Rehnquist eras coincides both with certain newer arrivals at the Court and with changed patterns of reliance among some "longer term" Justices. Justices Souter and O'Connor, newer members of the Court, use substantive canons considerably more often than Justices Powell and Stewart did during the Burger Court years. In addition, Justices Stevens and White relied on substantive canons more frequently after 1986 than they had as Burger Court members.[181] This latter increase may relate in part to a different kind of change in the Court's methodological culture, stemming from heightened interest in federalism issues.[182]

D. The Canons and the Size of the Court Majority

A further dimension to our description of canons usage involves the possibility that patterns of reliance may differ in close cases as opposed to unanimous decisions or those that are nearly unanimous (such as 8-1 or 7-2 votes). For this purpose, we have grouped the dataset in four categories, depending on whether the Court's decision (i) was unanimous (involving zero dissenters); (ii) enjoyed a wide margin of support (a vote differential of five, six, or seven); (iii) was supported by a moderate-sized majority (a vote margin of three or four); or (iv) was a close case (a vote margin of one or two).[183] Table VII reports the frequency of language canon usage for each of these four categories. We measure reliance as a proportion of the total number of majority opinions in each of our four vote differential categories and in each of our two Court eras. Thus, for instance, the

180. SCALIA, *supra* note 10, at 28; *see also supra* note 37 and accompanying text. Justice Scalia, however, does regularly join majority opinions that rely on the substantive canons, and he has not distanced himself from such reasoning in separate concurrences as he has often done with respect to legislative history reliance by the majority. *See supra* note 165.

181. Justice Stevens's increased usage between the two eras was significant ($t = .01$), as was Justice White's ($t = .048$).

182. Several of the majorities authored by Justices Stevens or White in this post-1986 period rely on substantive canons protecting state interests or state jurisdictional authority against federal interference. *See, e.g.*, Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820 (1990); Massachusetts v. Morash, 490 U.S. 107 (1989); Will v. Mich. Dept. of Police, 491 U.S. 58 (1989).

183. We counted concurring opinions on the side of the majority, while an opinion or vote that both concurred and dissented was counted as a dissent.

Burger Court relied on language canons in 18.6 percent of its 118 unanimous majority opinions while the Rehnquist Court did so in 21.6 percent of its 134 unanimous majorities.

As presented in Table VII, there are intriguing differences evident over time in the amount of intra-Court controversy attached to majority opinions that invoke language canons. The Burger Court relied on language canons in its unanimous majority opinions more than twice as often as it used them in closely contested cases. The fact that language canon usage is more likely to be associated with broad consensus among the Justices is consistent with a view of these canons as content-neutral justifications that may well facilitate agreement across traditional ideological lines.[184]

Table VII: Reliance on Language Canons by Size of Majority Opinion Margin (N = 632)

Size of Majority	Lang. Canon% All Years	Lang. Canon% Burger Years	Lang. Canon% Rehnquist Years
Unanimous	20.2 (252)	18.6 (118)	21.6 (134)
Wide*	13.0 (123)	6.8 (73)	22.0 (50)
Moderate	13.8 (109)	11.6 (69)	17.5 (40)
Close*	17.6 (148)	7.8 (90)	32.8 (58)

*indicates t-test reveals a significant difference in reliance between Burger Court and Rehnquist Court for a given majority vote margin

By contrast, the Rehnquist Court has relied on language canons in close cases somewhat more often than it has in unanimous decisions, although the difference is not significant.[185] Further, the Rehnquist Court has been significantly more likely than the Burger Court to use language canons in support of narrow majorities. This very different Rehnquist Court profile, in which so many closely contested decisions include language canon reliance, suggests a possible link between these canons and recent policy-related divisions within the Court. We return to this association in Part III. E.

For similar size-of-majority data regarding the substantive canons, we turn to Table VIII. Once again, reliance is assessed as a

184. *See* Macey & Miller, *supra* note 11; Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 247-49 (1991). The Burger Court's increased tendency to rely on language canons in unanimous opinions as contrasted with closely contested cases is significant ($z = .004$).

185. For the Rehnquist Court's increased tendency to rely on language canons in close cases as contrasted with unanimous opinions, $z = .15$.

proportion of the total number of majority opinions in the four vote differential categories, broken down into Burger and Rehnquist Court eras.

Table VIII: Reliance on Substantive Canons by Size of Majority Opinion Margin (N = 632)

Size of Majority	Subst. Canon% All Years	Subst. Canon% Burger Years	Subst. Canon% Rebnquist Years
Unanimous	12.7 (252)	9.3 (118)	15.7 (134)
Wide	9.8 (123)	6.8 (73)	14.0 (50)
Moderate	7.3 (109)	5.8 (69)	10.0 (40)
Close*	14.2 (148)	10.0 (90)	20.7 (58)

*indicates t-test reveals a significant difference in reliance between Burger Court and Rehnquist Court for a given majority vote margin

Here, the contrast between Burger and Rehnquist periods is not as great. During both eras, substantive canons were used more in close cases than in unanimous decisions. Indeed, they were used in close cases more than in any of the three other categories. Given that these substantive canons generally *do* represent judicial policy preferences, often related to politically divisive issues such as federalism or separation of powers, it is not terribly surprising that reliance on them is associated with more divisive voting patterns among the Justices. Still, it is noteworthy that the Rehnquist Court Justices remain significantly more likely than their Burger Court counterparts to rely on substantive canons when justifying results in the closest cases.

E. The Canons and Ideology

In attempting to assess whether canon usage during our thirty-four year period points distinctively in a liberal or conservative direction, we adopt a number of different perspectives. We ask first if reliance on the canons is predictably related to a particular kind of ideological result in majority opinions taken as a whole. We then look separately at distinct groups of conservative and liberal Justices, to assess how each group uses canons in relation to its respective policy preferences. Next, we focus on the subset of 148 closely contested decisions, considering the extent to which reliance on the canons in this more controversial setting has ideological associations. Finally, we examine the ideological tenor of a special group of cases in which

majority reliance on canons clashes with dissent dependence on legislative history or on competing canons.

Each of these approaches reveals only part of a complex picture; even taken together, they cannot be fully responsive on the relationship between canon usage and ideological outcome. In addition, it is not self-evident how one should define "neutral" in this context. We adopt as our presumptive definition that an interpretive resource is ideologically neutral if its use by the Court is as likely to be associated with a liberal result as with a conservative one. We attempt to control for the influence of other factors by supplementing our bivariate analyses through the use of regression equations.[186] At the same time, we are unable to control for certain influences that may help determine which Justice will write a majority opinion, and whether others will have input. These elements include, at a minimum, (i) the prospect (especially in unanimous or near-unanimous decisions) that opinion assignments may serve workload equalization goals rather than reflect an assigned writer's ideological perspective; (ii) the extent to which (especially in closer decisions) opinion assignments and substantive reasoning may promote strategic considerations such as retaining a fragile majority coalition;[187] (iii) the

186. The use of a multinomial logistic regression model allows multiple categories of the dependent variable to be analyzed and compared against a base category, and—as a result of being included in the same analysis—also against each other. The primary analysis uses as its four-part dependent variable whether a majority opinion expressly relied on no canons at all, language canons alone, substantive canons alone, or both types of canons, in justifying its result. The model includes as independent variables—in addition to the liberal or conservative nature of the outcome and of the opinion author—a large number of background factors addressed to the subject matter of the case, the vote margin enjoyed by the majority, the types of interpretive resources (other than canons) relied on in the Court's reasoning, and the presence or absence of selected interpretive resources in the dissent's reasoning.

If logistic regression had been used instead of multinomial logit, the analyses would be insufficient to gauge the import of the canons because (for instance) a model focused on language canons would be comparing language canon usage against all other categories, not just against no canon usage. Multinomial logistic regression analysis more accurately reflects the reality of the potential canon usage employed by the Justices, through proper comparisons. *See* TIM FUTING LIAO, INTERPRETING PROBABILITY MODELS 48-50 (1994). We report our basic multinomial regression results in Tahle XII *infra*. We also ran additional regression equations to address supplemental questions; results are summarized in notes 191, 192, 201, 214, 221 and accompanying text *infra*. Copies of these additional regression results are available from the authors upon request.

187. There are many examples of an opinion with a liberal outcome being written by the most conservative member of the majority coalition (or conservative opinions written by the most liberal member of the coalition) to ensure the majority holds firm or that it is narrowly confined. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (O'Connor, J., majority opinion) (holding that law school's narrowly tailored use of race as a factor in admissions for the purpose of achieving a diverse student body did not violate Equal Protection Clause); *see also* Linda Greenhouse, *Steady Rationale at Court Despite Apparent Bend*, N.Y. TIMES, May 28, 2003, at A22 (suggesting that Chief Justice, who retained assignment in important Eleventh Amendment

impact of collegial exchanges at oral argument and in private settings on the Justice assigned to write the opinion;[188] and (iv) the unarticulated and even subconscious differences in intensity of policy preference brought to the table by each potential majority author.

Still, our multifaceted exploration does help to illuminate the diverse connections between canon usage and ideological outcomes. Importantly, our approach also reaffirms the basic nature of the relationship between judicial reasoning and decisional outcome as situational and evolving rather than uniform and static. Through examining a series of large and small case groupings, we can observe the circumstances under which the Justices appear to rely on the canons as neutral interpretive resources at the broadest level, and yet as instruments functioning to support or even strengthen certain ideological leanings as we focus more narrowly on controversial, closely divided settings.

1. Ideology and the Dataset as a Whole

Initially, we have grouped the dataset in three categories, based on whether the outcome was liberal (pro-employee or pro-union), conservative (pro-employer), or, in a small number of cases, indeterminate.[189] Table IX reports the frequency of language canon and substantive canon usage for the 584 cases with an identified ideological result and also the 48 indeterminate decisions. While decisions relying in part on substantive canons appear to be slightly more conservative than the conservative proportion of all decisions, and decisions invoking language canons seem marginally more liberal than the percentage of all decisions, neither difference is close to significant.

---

decision, had used his majority opinion to continue Court's institutional control of linedrawing in this area). *See* HENRY J. ABRAHAM, THE JUDICIARY: THE SUPREME COURT IN THE GOVERNMENTAL PROCESS 37 (10th ed. 1994).

188. *See* Edwards, *supra* note 110, at 1661-62 (arguing that variable-based empirical analysis of judicial decisionmaking fails to capture the "process of dialogue, persuasion, and revision" that characterizes appellate deliberations).

189. *See supra* notes 76-80 and accompanying text for a detailed explanation of how we coded judicial outcomes, including indeterminate results.

Table IX: Reliance on Canons by Ideological Outcome (N = 632)

	Liberal Decision%	Conservative Decision%	Indeterminate %
All Cases	47.6 (301)	44.8 (283)	7.6 (48)
Language Canon Cases	49.1 (53)	43.5 (47)	7.4 (8)
Substantive Canon Cases	42.5 (31)	50.7 (37)	6.8 (5)

We also used a multinomial logistic regression model to probe further into the possibility that the Court's overall reliance on either language canons or substantive canons might be associated with a particular ideological direction. We analyzed whether reliance on either language or substantive canons was significantly associated with a liberal or conservative result when controlling for the subject matter being decided, the size of the Court's majority, and the use of other interpretive resources.[190] The independent variable addressing decisional outcome was never close to significant.[191] In an effort to determine whether the Court's reliance on canons might have become more ideological over time, we applied the same multinomial regression model to the two subsets of all 350 Burger era decisions and all 282 Rehnquist era cases. There was no significant relationship between decisional outcome and majority reliance on language canons or substantive canons in either era.[192]

With respect to substantive canons, it is possible that our finding of overall neutrality reflects at least in part the "balancing" impact associated with the Court's use of several types of substantive canons in this area of law. When the Court invokes its "superstrong clear statement rule," requiring the clearest possible evidence that Congress meant to abrogate the Eleventh Amendment immunity of the states, the result almost always has been a victory for the state as

190. *See supra* note 186 (discussing our approach to multinomial logit regressions).

191. We also constructed a separate logistic regression equation in which decisional outcome was the dependent variable and language canon usage, substantive canon usage, and both canons' usage were included as independent variables. None of these canon options was close to significant. Indeed, only one interpretive resource independent variable showed significant or close to significant results with decisional outcome as a dependent variable. Majority opinions relying on common law precedent were significantly associated with conservative results ($p = .04$). Copies of these regression results are on file with the authors.

192. Copies of these two regression results are on file with authors.

employer.[193] In addition, two other canons less often invoked—the presumption against interpreting statutes to apply retroactively and the presumption against waivers of sovereign immunity by the Federal government—have been associated with consistently pro-employer outcomes.[194] By contrast, the canon that Congress is presumed to follow common law usage, and the canon presuming against federal preemption of historic or traditional state functions, have regularly been associated with pro-employee outcomes in this thirty-four-year period.[195] Finally, the constitutional avoidance canon has been relied on virtually as often in liberal as in conservative decisions—both during the Rehnquist years and in the Burger era.[196]

2. Ideology and Canon Reliance by Conservative and Liberal Justices

Although the use of the canons by the Court taken as a whole has not been associated with a conservative or liberal direction, there remains the possibility that canon reliance is ideologically linked in the hands of certain conservative or liberal Justices. To consider this possibility, we focus on two ideologically identifiable subgroups: the five most conservative members of the Rehnquist Court[197] and the

193. There have been eight such cases (six in the Rehnquist era), and seven have yielded conservative, pro-employer outcomes. The one exception was *Port Authority Trans-Hudson Corp v. Feeney*, 495 U.S. 299 (1990).

194. There have been three decisions relying on the anti-retroactivity presumption and five decisions invoking the presumption against waivers of sovereign immunity: all eight reached conservative outcomes.

195. Of the six majority opinions relying on the "Congress follows common law usage" presumption, four reached liberal results, one was conservative, and one indeterminate. Of the eleven majority opinions relying on what we refer to as the anti-preemption canon (*see supra* text accompanying notes 154-155), seven reached liberal results, three resulted in conservative outcomes, and one was indeterminate. The latter findings appear to reflect changes in the tenor of applicable state statutes and common law. In the 1950s and 1960s, NLRA preemption cases often involved state law that imposed restraints on union activities, making states' authority less supportive of what were deemed employee interests than was the federal statute that arguably preempted them. *See, e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). By the 1980s, state statutory and common law developments offered increased rights and protections to employees, and the "anti-preemption" position became more favorable to employee interests than it had been in earlier decades. *See, e.g.*, Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 755-56 (1985).

196. Of the twelve cases making use of this canon in our dataset, six have reached liberal outcomes, five conservative, and one decision was indeterminate. In the Rehnquist era, five majority opinions have relied on the constitutional avoidance canon: two reached conservative results while three were liberal decisions.

197. Four of the five conservatives, Justices Rehnquist, Scalia, Thomas and Kennedy, voted for individual employees or unions (against employer, business, or government related positions) between 28 percent and 38 percent of the time, based on Spaeth issue codes. The fifth conservative, Justice O'Connor, voted for individual employees or unions 46 percent of the time. See *supra* note 85 (explaining liberal and conservative voting scale, with vote scores for each

eight most liberal Justices who served for at least nine years on the Rehnquist or Burger Courts.[198]

As reported in Table X, the liberals and conservatives seem to have relied on both language and substantive canons as support for their pre-existing ideological preferences, with one qualification discussed briefly below. Thus, our eight liberal Justices authored slightly more than three liberal majority opinions for every two conservative ones, and they maintained that same approximately 3:2 ratio for majorities that relied on language canons as well as majorities that relied on substantive canons.[199] Our five conservative Justices wrote slightly more than twice as many conservative majority opinions as liberal ones, and this ratio also persisted for majorities that relied on language canons.[200] We ran a series of regression equations to see if we could detect either a "neutralizing effect" (Justices are less ideological than normal when relying on canons) or a "magnifying effect" (Justices relying on canons become even more ideological than normal) in the use of canons by our eight liberal or five conservative Justices. In each of our equations, the results for the ideological variables were not close to significant.[201] Overall, the use of canons was not associated with either a more liberal or a more conservative set of outcomes for either of these two ideologically distinct groups.

Justice). We omitted Justices Powell, Burger, and Harlan because of our interest in focusing on the dynamic at work within the reigning conservative majority on the Rehnquist Court. These three moderately conservative Justices (Spaeth scores of 45.1 percent, 41.1 percent, 49.8 percent) are part of our reference category for regressions.

198. Two of the eight liberals, Justices Marshall and Brennan, voted for individual employees or unions more than 78 percent of the time under the Spaeth issue codes, while a third liberal, Justice White, supported individuals 60 percent of the time. The five other liberals, Justices Stevens, Souter, Ginsburg, Breyer, and Blackmun, voted for individuals between 62 percent and 73 percent of the time. *See supra* note 85. We omitted Justices Douglas and Black because (like Justice Harlan) they served for such relatively short periods (two to six terms) during the Burger era, and we omitted Justice Stewart because of his "hybrid" characterization (modestly liberal under Spaeth, modestly conservative under our dataset). These three liberal Justices are part of our reference category for regressions (along with Justices Powell, Burger, and Harlan).

199. The exact ratios are 63:37 liberal for all cases, 62.5:37.5 liberal for language canon cases, and 64:36 for substantive canon cases.

200. The exact ratios are 68:32 conservative for all cases and 69:33 conservative for language canon cases.

201. *See infra* tbl.XII for basic multinomial model: neither "directional Justice" variable was close to significant. We also looked separately at decisions involving only the conservative subgroup and liberal subgroup; the decision outcome variable was not close to significant for either subgroup. Copies of these subgroup regression results are on file with authors.

Table X: Reliance on Canons by Selected Liberal and Conservative Justices (N = 507)[202]

	Liberal Justices		Conservative Justices	
	Lib. Decision%	Cons. Decision%	Lib. Decision%	Cons. Decision%
All Cases	58.1 (198)	33.7 (115)	30.7 (51)	64.5 (107)
Lang. Canon Cases	57.4 (35)	34.4 (21)	28.6 (10)	62.9 (22)
Subst. Canon Cases	59.5 (25)	33.3 (14)	20.8 (5)	70.8 (17)

These findings of a "supporting effect" do not mean that the Justices have consciously manipulated the canons to serve their respective policy objectives. Nor should the effect be understood to imply, for example, that liberals' reliance on the canons was the driving force enabling them to justify the liberal results they reached 60 percent of the time. As we noted earlier, the Justices typically rely on multiple interpretive resources, and the canons may well be supportive in an ancillary rather than dispositive sense in explaining the Court's outcome. In addition, canon reliance tells us nothing about the underlying intensity or magnitude of the ideological result—whether, for instance, liberals' reliance occurs most often in cases that are relatively routine or that do not carry substantial policy consequences.

Our findings do indicate, however, that the canons are not having an independent, constraining effect on the Justices' decisionmaking—in particular, they are not functioning as a set of overarching "neutral principles" in the hands of either liberal or conservative Justices. Put differently, the canons' self-evident persuasiveness and logical force are not leading liberal, or conservative, Justices whose opinions rely on the canons closer to the Court's ideological center. One might counter that such a "neutralizing" hypothesis is unrealistic if not naïve. Given that the Justices vote in conference on a result before they agree in writing on a set of reasons, each majority opinion inevitably must use interpretive resources to justify an already established outcome. At the same time, the canons are touted as an important and putatively neutral element in the bundle of competing, principled contentions presented to the Justices by the parties and amici. On this view, they

202. The "N" of 507 includes 36 indeterminate majorities (neither liberal nor conservative) authored by these 13 Justices: 28 authored by liberal Justices and 8 by conservative Justices. For this reason, the percentages in Table X do not add up to 100 for either liberal or conservative Justices.

should be capable of playing at least a modestly leveling role in shaping the outcome itself.

As we have seen, some scholars have implied such a role for the canons, by characterizing them as "off-the-rack gap-filling rules" or conventional signals that enhance the predictability of statutory meaning.[203] Insofar as the language canons, for example, "embody plausible or even irresistible judgments about how words should ordinarily be understood,"[204] such an understanding would seem to have no particular ideological orientation. Because, however, these "plausible or irresistible judgments" are more likely to be associated with liberal results in the hands of liberal Justices and conservative results in the hands of conservatives, the language canons that embody them do appear to function as a form of assistance for preferred policy outcomes.

One additional aspect of Table X deserves mention. Decisions authored by our five identified conservative Justices that rely on the substantive canons reach conservative results more than three times as often as liberal outcomes. While the low number of decisions involved, twenty-four, may contribute to the absence of statistical significance,[205] this set of outcomes is more sharply defined in ideological terms than any of our findings involving language canons or than any group of decisions authored by the eight designated liberal Justices. The finding, therefore, raises the possibility that reliance on substantive canons by the reigning Court majority may be more closely connected to ideology than it was in the past.

3. Canons and Ideology in Close Cases

Although all cases considered by the Supreme Court are in some sense controversial, the Justices end up resolving many cases without disagreeing among themselves, while many others involve narrow vote margins and extended, reasoned dissents. In order to consider the possibility that highly contested decisions involving canon usage might have their own distinct policy orientation, we compare ideological outcomes for two categories of cases discussed in Part III D above: unanimous decisions and close cases. Table XI reports our results, which indicate that as a general matter unanimous decisions during our thirty-four year period are more

203. Eskridge & Frickey, *supra* note 12, at 67; Shapiro, *supra* note 12, at 943-45.

204. SUNSTEIN, *supra* note 18, at 149-50.

205. When comparing the mean for decisions written by the five conservatives relying on substantive canons with the mean for such decisions by all other Justices, $t = .15$. The overall number of such decisions (twenty-four) includes two that are indeterminate in outcome.

likely to produce liberal outcomes, while close cases tend to yield conservative results.

Table XI: Reliance on Canons in Unanimous and Close Cases (N=400)[206]

	All Cases		Lang. Canon Cases		Subst. Canon Cases	
	Lib. Decision	Cons. Decision	Lib. Decision	Cons. Decision	Lib. Decision	Cons. Decision
	%	%	%	%	%	%
Unanimous	62.3 (157)	31.7 (80)	62.7 (32)	33.3 (17)	65.6 (21)	31.3 (10)
Close	39.2 (58)	52.7 (78)	30.8 (8)	57.7 (15)	23.8 (5)	71.4 (15)*

*indicates t-test reveals a significant difference between close (or unanimous) decisions involving reliance on a particular type of canon and close (or unanimous) decisions not involving such reliance.

The conservative or pro-employer nature of our 148 close cases (53 percent conservative versus 39 percent liberal) warrants brief attention. Our finding may well be attributable at least in part to the political context of the appointments that have been made to the Court since 1969. Of the eleven Justices who became members of the Supreme Court between 1970 and 1994, nine were selected by Republican presidents and each was more conservative in terms of relevant judicial philosophy than the Justice he or she replaced.[207] As the majority has gradually shifted in a conservative direction, the cases that most closely divide the Court understandably have tipped in that direction as well.[208]

---

206. Note that N of 400 consists of 252 unanimous cases (15 indeterminate) and 148 close cases (12 indeterminate); because of indeterminate cases (6.0 percent of unanimous; 8.1 percent of close), percentages in Table XI do not add up to 100.

207. The series of replacements was as follows: Blackmun for Fortas; Rehnquist and Powell for Harlan and Black; Stevens for Douglas; O'Connor for Stewart; Scalia for Burger; Kennedy for Powell; Souter for Brennan; Thomas for Marshall. Each new Justice scores more conservative on the Spaeth scale than the Justice being replaced.

208. The tendency for unanimous cases to produce liberal results is consistent with judicial behavior research into the Burger, Warren, and Vinson Courts. *See* Saul Brenner & Theodore S. Arrington, *Unanimous Decision Making on the U.S. Supreme Court: Case Stimuli and Judicial Attitudes*, 9 POL. BEHAV. 75, 78-80 (1987). The authors speculate that conservative Justices during this period may have felt more constrained by rule-of-law norms than did their liberal counterparts, and hence more often voted to uphold positions with which they disagreed in policy terms. *Id.* at 83. One possible explanation for the liberal tilt in unanimous decisions during our thirty-four year period is as a kind of reaction to the increasingly conservative Court. Lower courts anticipating the Supreme Court's direction, and pro-employer litigants enthused about where the Court seems to be heading, may tend to expect more rapid conservative movement than the Court is prepared to undertake, or to overreach on occasion in their litigation strategies. The Court's response to such excesses is a unanimous rebuff. A perhaps more cynical alternative

More interesting for our purposes, however, is the fact that closely divided decisions in which the majority relies on substantive canons are significantly more conservative than close cases in general, and close cases in which the majority relies on language canons also have a conservative tilt. While 39 percent of all close cases yield liberal results, 31 percent of such cases relying on language canons and 24 percent of those cases invoking substantive canons come down in favor of employees.[209] By contrast, Table XI indicates that unanimous opinions relying on language canons or substantive canons are neither more nor less liberal than unanimous opinions in general.

We noted earlier that Rehnquist Court Justices are significantly more likely than their Burger Court colleagues to rely on both language canons and substantive canons when justifying results in close cases.[210] That outcomes in these close, canon-invoking majority opinions turn out to be especially conservative is a result warranting further attention. At a minimum, our finding points to an ideologically conservative climate when the canons are relied upon in cases that divide the Justices.

It is possible, however, that increased canon reliance in close cases is more a byproduct of ideological divisiveness than a contributing factor to it. When a Supreme Court decision is being challenged internally, the majority opinion author may well feel more pressure to develop principled and assertedly content-neutral reasons that will be viewed as persuasive by the inner circle of informed Court followers and perhaps by the general public as well.[211] In these circumstances, the canons may take on additional value to the extent that they are perceived by judges, lawyers, and the public as relatively neutral or principled.

Yet, our results suggest that this "enhanced reliance" effect is not ideologically neutral with respect to the canons: it occurs more often in close conservative decisions than close liberal ones. In close cases that reach conservative results, the majority author relies on

---

would be that unanimous cases involve issues that are either less important in policy terms or less intensely "ideological," hence liberal victories can be ceded at relatively small cost.

209. These results are significant for substantive canons when using the t-test ($t = .04$), although not for language canons ($t = .20$). Once again, the low number of decisions involved (twenty-six close cases relying on language canons, including three indeterminate, and twenty-one close cases relying on substantive canons, including one indeterminate) makes it more difficult for results to achieve statistical significance.

210. *See supra* tbls.VII,VIII.

211. It is noteworthy in this regard that majority opinions in close cases rely on significantly more interpretive resources than majority opinions in unanimous cases (3.45 resources on average versus 3.13, $Z < .01$). Majority opinions in wide-margin and moderate-margin cases also invoke more resources than majorities in unanimous cases, but the increases there are slight and not significant.

substantive canons 19.2 percent of the time, whereas for close liberal decisions the majority opinion invokes substantive canons only 8.6 percent of the time. The difference is less stark for language canons, but it points in the same direction: 19.2 percent of close conservative decisions rely on language canons, whereas only 13.8 percent of close liberal decisions do so.[212] Accordingly, it remains plausible to ask whether canon reliance in contested cases is contributing to—not simply reflecting—conservative outcomes.

In order better to understand the dynamics at work for the subset of cases in which dissents have been written, we conclude this Part with a more detailed picture of canon usage by the Justices.

212. This conservative tilt to canon reliance is further evidenced in majority opinions authored by the five Rehnquist conservatives. Of their fourteen close decisions with an ideological outcome that relied on canons, all fourteen reached a conservative result. Of their eighteen close decisions with an ideological outcome that did *not* invoke canons, two (11.1 percent) reached liberal results. Even for the eight liberal Justices, close case outcomes they authored were slightly more conservative with canon reliance: 63.2 percent liberal with reliance (twelve of nineteen), and 68.5 percent liberal without reliance (thirty-seven of fifty-four).

4 Ideology and the Tensions Between Majority and Dissent

We report the results of our multinomial logistic regression equation, in which the dependent variable involves four possible forms of canon use in majority opinions: language, substantive, both types, or no canons. We are especially interested in the possibility that dissenting opinions might in effect challenge canon reliance, by contending that such reliance either is an effort to thwart congressional intent or reflects a selective or manipulative use of the canons as a resource. Accordingly, we include as independent variables whether the dissenting opinion relied on legislative history, on language canons, or on substantive canons. Additional independent variables address majority reliance on the eight interpretive resources other than the canons.[213] We also include as control variables the ideological direction of the decision, the Court era (Burger or Rehnquist) in which it was decided, the subject matter addressed, whether the majority was written by a liberal or a conservative Justice,[214] and the majority opinion vote margin.[215] Table XII reports our results.

213. We do not need a reference category here, because coding of the interpretive resources does not involve mutually exclusive classifications.

214. We rely here on our previous grouping of eight long-serving liberals and the five conservatives on the Rehnquist Court, *see supra* notes 197-98 and accompanying text. We use the six other Justices (Powell, Burger, Harlan, Stewart, Black, Douglas) as our reference category. We ran the same multinomial regression equation grouping liberals and conservatives solely based on the Spaeth scale, in order to be sure our interest in the Rehnquist conservative majority was not skewing results. In this alternate regression, our reference category was moderate-voting Justices (45-55 percent for employees) — O'Connor, Powell, Harlan, Stewart. Results were virtually identical — everything significant in Table XII was also significant in the alternate equation. Two additional variables were significant in the alternate equation: the five conservatives used language canons more than the ten liberals ($p = .01$), and reliance on both canons was associated with dissent invocation of language canons ($p = .05$). Copies of this additional regression are on file with the authors.

215. We use wide-margin cases as our reference category for vote margin. In addition, we use labor relations as the reference category for subject matter. The control variable for ideological direction (which is fairly evenly distributed) is coded "-1" for conservative, "0" for indeterminate, and "1" for liberal, precluding the need for a reference category.

Table XII: Multinomial Logistic Regression for Canon Use in Majority Opinions (N = 701)

	Language Canons	Substantive Canons	Both Canons
Interp. Resources			
Textual Meaning majority	1.73 (.38)**	.25 (.34)	1.57 (.66)**
Dictionary majority	.03 (.65)	-.86 (1.16)	-34.80 (.67)**
Leg. History majority	.12 (.30)	.16 (.39)	1.00 (.57)*
Leg. Purpose majority	.22 (.31)	-.07 (.34)	-1.03 (.52)**
Leg. Inaction majority	.43 (.57)	1.13 (.62)*	-.10 (.97)
Supreme Court Precedent majority	-.05 (.30)	.54 (.43)	.44 (.54)
Common Law Precedent majority	.24 (.43)	.35 (.47)	.21 (.66)
Agency Deference majority	-.50 (.36)	-2.49 (1.06)**	-.73 (.66)
Leg. Hist. dissent	.32 (.36)	1.27 (.42)**	.78 (.84)
Lang. Canon dissent	.88 (.44)**	.35 (.61)	1.24 (.78)
Subst. Canon dissent	.11 (.51)	.91 (.55)*	-34.30 (.71)**
Control Variables			
Liberal decision	.10 (.15)	-.09 (.17)	-.20 (.25)
Liberal author	-.10 (.44)	.32 (.51)	.81 (.97)
Conservative author	.37 (.47)	.43 (.66)	-.96 (1.16)
Burger Court	-.65 (.33)**	-.76 (.40)*	-.76 (.68)
Unanimous	.79 (.44)*	1.08 (.52)**	.82 (.71)
Close	.62 (.44)	.74 (.51)	.10 (.83)
Middle	.11 (.49)	-.09 (.60)	-1.75 (1.35)
Sex/race discrimination	-.09 (.39)	-.31 (.51)	.86 (.93)
General discrimination	-.20 (.51)	.38 (.59)	.64 (.94)
Min. Standards	.81 (.40)**	-.06 (.69)	-35.50 (.67)**
Retirement	.75 (.43)*	1.20 (.57)**	.64 (1.09)
Negligence	-1.05 (1.05)	.72 (.72)	-34.70 (1.02)**
Miscellaneous	-.21 (.57)	.33 (.74)	2.04 (.81)**
Constitutional	-35.40 (.32)**	.81 (.44)*	-34.50 (.84)**
Constant	-3.52 (.75)**	-4.01 (.92)**	-5.35 (1.73)**
Observations	90	55	18

**$p \leq .05$, *$p \leq .10$

Prob>Chi-squared= .000 **Pseudo R^2= .22**

Robust Standard Errors based on clustering by case appear in parentheses next to coefficients. Base Category for comparison is no canons used.

Certain control variables have achieved significance when compared to the base category of no canons.[216] The majority is more likely to rely on language canons, and also on substantive canons, in opinions written during the Rehnquist era, in opinions resolving retirement issues, and in opinions that are unanimous.[217] In addition, the majority is significantly more likely to rely on language canons in opinions that address minimum standards issues, and the relationship between reliance on substantive canons and opinions resolving constitutional issues approaches significance. All of these findings are broadly consistent with results reported in some of our earlier bivariate tables.[218]

---

216. We follow the common social science approach of designating regression results with p-value of .05 or less as "significant," and results with a p-value of .10 or less as "approaching significance." DAVID MOORE, STATISTICS: CONCEPTS AND CONTROVERSIES 506-07 (4th ed. 1997). Our multinomial logistic regression includes subject matter variables because addition of those variables more accurately captures the Justices' use of different resources in the cases. *See supra* notes 74 and 138. As a result, the regression employs a different unit of analysis (subject matter categories, N=701) than many of our prior analyses of canon usage (cases, N=632). While a case-based analysis makes sense for most discussions of decisions in bivariate terms, subject matter controls should be included in order for a regression to be fully specified. We have addressed issues of heteroskedasticity with respect to the lack of independence for observations from the same case, through clustering the data by case and then using the Huber-White correction to produce robust standard errors. The use of robust standard errors is the more accurate statistic for significance where heteroskedasticity is present or even possible. *See* DAMODAR N. GUJARATI, BASIC ECONMETRICS 61-63 (3d ed. 1995) (explaining heteroskedasticity); STATA CORP., STATA BASE REFERENCE MANUAL AND USER'S GUIDE 254-258 (2001) (describing how Huber-White correction is used to obtain robust standard errors).

217. For Rehnquist era opinions, results are significant for language canons and approach significance for substantive canons. For retirement issues and unanimous opinions, results are significant for substantive canons and approach significance for language canons. In addition, the relationship between majority reliance on both types of canons in the same opinion and decisions construing miscellaneous employment-related provisions is significant. Use of "both canons" in a majority opinion occurs only eighteen times, and the two types of canons display quite different traits when considered separately. We comment on further results from the Both Canons category *infra* note 220.

There is a statistical artifact associated with the way Stata calculates the Huber-White correction for clustering. Stata uses a point estimation technique that in this setting changes findings of zero observations for a given variable to a very small number of observations (something close to .0000001). As a result, five variables in the Both Canons results and one (constitutional matters) in the Language Canon results appear to be extremely significant in the negative direction when in fact there are no observations of any of these variables being related to the use of the canons in question.

218. The significance of Rehnquist era reliance is consistent with Table I; significance for retirement-related issues, and also minimum standards issues, is consistent with Tables III and IV. With respect to unanimous opinions, data from Tables VII and VIII indicate canons were used in the Burger years siguificantly more often in unanimous cases than in close decisions, and in general were invoked more frequently in unanimous opinions than in any of the nonunanimous groupings we coded. Although constitutional issues were not significant overall in Table IV (substantive canons), there was a significant increase in reliance between the Burger and Rehnquist eras.

A number of interpretive resources also are significant with respect to one type of canon or the other. Majority opinions that rely on the language canons are significantly more likely to rely on the meaning of the text as well. This is not surprising inasmuch as reliance on such canons will almost invariably be linked to close textual analysis. Majority opinions relying on the substantive canons are significantly *less* likely to rely on agency deference. Thus, when the Justices choose to rely on judicially developed norms or policies, they are less willing to view executive branch interpretations as persuasive authority.[219] At the same time, majority opinions relying on substantive canons are *more* likely to invoke legislative inaction. Such reliance on the *absence* of probative legislation suggests that the Justices may be especially attuned to evidence of congressional passivity when they decide to embrace their own policy-related norms.[220]

Finally, it is notable that when the majority relies on canons in nonunanimous opinions, the dissent is significantly more likely to rely on legislative history than when canons are not part of the majority's reasoning. For substantive canons, the association is significant over the entire thirty-four year period. For language canons, the overall

---

Significance based on t-tests in bivariate analysis does not always appear in regression results because of the complex interaction among variables and the relative weight of each variable based on its N size. What appears as significant in a bivariate analysis is important for understanding the interactions between two variables, but it may not be powerful enough to achieve significance in a regression model. We have chosen to report both bivariate and regression results in an attempt to provide a full and textured description of the relationship between canon usage and other factors that help explain the Court's decisions.

219. This diminished propensity to defer to agency interpretations does not extend to majority opinions relying on language canons.

220. Apart from the statistical artifact described, *supra* note 217, three interpretive resources are significant or close to significant when majority opinions rely on both types of canons. The higher likelihood of also relying on textual meaning would seem to reflect the same link between language canons and close textual analysis identified for pure language canon reliance. The association between majority reliance on both canons and heightened reliance on legislative history may reflect in part the opinion-writing approach of Justices Blackmun and Stevens. Those two Justices authored eleven of the eighteen decisions relying on both types of canons (only one other Justice authored as many as two majorities in this category). As discussed earlier, their legal process approach typically leads them to invoke legislative history to confirm or reinforce the apparent meaning of the text. *See supra* notes 167-168 and accompanying text. Of the eleven majority opinions by Justices Blackmun and Stevens, seven relied on legislative history. It is also noteworthy that none of the eighteen opinions was authored by Justices Scalia or Thomas, who are most persistently hostile to relying on this intent-oriented resource. Finally, while majority reliance on both canons is associated with *diminished* reliance on legislative purpose, the eighteen majority opinions do rely on legislative purpose 67 percent of the time (twelve opinions); this, however, is a significant decline in relation to the 83.4 percent level of reliance on legislative purpose for the base category of no canons. *See also supra* tbl. I (reporting 81.2 percent level of reliance on legislative purpose for all 632 majority opinions).

result is not significant but further analysis indicates that dissent reliance on legislative history is significant during the Rehnquist era.[221] In addition, Table XII indicates that majority reliance on language canons is associated with a significant increase in dissent dependence on language canons, while the relationship between majority and dissent reliance on substantive canons approaches significance.[222] These results suggest the presence of certain competitive tensions in the Court's interpretive approach that warrant further analysis at the individual case level.

In an effort to identify cases that are potentially illustrative of these tensions, we compiled two lists. One consists of decisions in which the majority relies on language canons or substantive canons but *not* legislative history, while the dissent relies on legislative history. We assume *arguendo* that when both majority and dissent invoke legislative history, there is likely to be reasonable disagreement about what Congress actually intended. Conversely, we assume that when a majority relies on canons *without* legislative history, either no reliable evidence of legislative intent is available to support the majority position or such evidence is viewed by the majority as irrelevant. In either case, the tension between a majority that declines to rely on evidence of congressional intent and a dissent that embraces such evidence raises the possibility that the canons may be used to frustrate or undermine Congress's discoverable preferences.

There are twenty-one decisions in which the majority opinion relies on language or substantive canons (but not legislative history) while the dissent invokes legislative history to support its position. Two of the twenty-one are ideologically indeterminate, but *of the nineteen decisions that have an ideological direction, seventeen are conservative in outcome.*[223] Further, sixteen of these nineteen cases (fourteen conservative) were decided by the Rehnquist Court, all between 1988 and 2003.

The second list of cases is comprised of decisions in which both majority and dissent rely on the canons. Here, we were influenced by Karl Llewellyn's famous article positing the presence of a

221. When running the full multinomial model on only Rehnquist era cases (*see supra* text accompanying note 192), the association with dissent reliance on legislative history is significant ($p = .04$). Copies of these results are on file with the authors.

222. Majority reliance on both types of canons is not significantly associated with dissent reliance on either language or substantive canons or on legislative history. Because nine of the eighteen majority opinions relying on both types of canons are unanimous, the number of decisions in this grouping that include a dissent is quite small.

223. We discuss or refer to ten of these nineteen decisions in Part IV.B.

countercanon for each canon as proof of the canons' fundamentally indeterminate nature.[224] We wondered whether a review of these "dueling canon" cases would suggest the Justices' willingness to engage one another regarding their competing reliance and also how that inter-canon tension related to the ideological orientation of the cases.

This second list includes thirty-three cases, three of which are ideologically indeterminate. Of the thirty cases that have an ideological direction, 73 percent (twenty-two) arose during the Rehnquist era, and 70 percent (twenty-one) reach conservative results. However, there is some overlap between our two lists: ten dueling canon cases also involved dissents relying on legislative history.[225] With these ten cases omitted, the ideological results are only modestly directional. There are thirteen conservative and nine liberal decisions, with eight cases decided by the Burger Court and fourteen by the Rehnquist Court.[226]

IV. THE MALLEABILITY OF THE CANONS: CASE LAW ANALYSIS AND CONTENDING THEORIES

While there are doubtless further empirical assessments that would shed more light on our results, we now shift our attention to the case-specific level. We have chosen to focus on individual Court decisions that address three specific aspects of our findings. Each aspect relates to one of the principal theorized accounts of how the canons function in the interpretive process.

First, we analyze several cases that exemplify the Court's reliance on language canons in more technical subject matter areas, and with respect to technical or procedural issues in an "ideologically charged" subject area. Following up on our discussion in Part III.B., we explore the extent to which the reasoning in these cases supports the public choice account of canon usage. Next, we consider a number of contested cases that illustrate the tension within the Rehnquist Court between reliance on canons and invocation of legislative history.

---

224. Llewellyn, *supra* note 22. Table XII reports that majority reliance on each type of canon (language and substantive) is significantly associated with dissent invocation of that same type of canon. We extended our list, however, to include cases in which both majority and dissent relied on canons of any kind, in order to consider more fully the doctrinal implications of these canon-related tensions.

225. All ten of these cases are from the Rehnquist years; eight bave conservative outcomes and two are indeterminate.

226. Lists of all decisions referred to in text accompanying notes 223, 225, and 226 are on file with authors.

This tension, described in Parts III.D. and E., seems to support the pessimistic assertions that canons are used to undermine identifiable legislative intent. Finally, we review certain divided decisions in which canons are relied on by both majority and dissent. These dueling canon cases, referred to in Part III.E., cast serious doubt on legal process claims that the canons enhance predictability and consistency in the interpretation of statutes.

In each instance, our doctrinal discussion is meant to be illustrative rather than exhaustive. We have uncovered various patterns of canon usage in Part III, but some individual cases will relate to those patterns more clearly than others. We believe the cases discussed below are appropriate examples that help us to assess the potential applicability of our three distinct accounts: public choice, pessimistic, and legal process. Together, they contribute to a nuanced, composite picture of how the canons have functioned as justifications for the Court's decisions. After examining cases in these three areas, we offer some thoughts on the role played by the canons in general, focusing on their value as well as their limitations.

A. Obscure Subject Matter and the Public Choice Account

As noted earlier,[227] Professors Macey and Miller contend that the canons, by which they seem to mean primarily language canons,[228] tend to be used in statutory cases of technical complexity and little ideological interest. According to Macey and Miller, these are the cases in which the Justices are most likely to worry about their lack of subject matter expertise and the possibility that they will make an embarrassing substantive or policy-related mistake.[229] By serving as a kind of "stop-gap" to facilitate decisionmaking "in the absence of a policy-based justification," these canons provide a "content-independent decision methodology" that often attracts unanimous or near-unanimous approval.[230]

The results set forth in Table III and the accompanying discussion provide some support for this account. Language canons are used significantly more in decisions interpreting ERISA and other retirement-related statutes, and in minimum standards cases—both subject areas that tend to be technically complex and less obviously

227. *See supra* notes 30-33 and accompanying text.

228. *See* Macey & Miller, *supra* note 11, at 663 (focusing on "content-independent justifications"); *id.* at 652 (using as their illustrative decision *Breininger v. Sheet Metal Workers*, 493 U.S. 67 (1989), which relies on *ejusdem generis).*

229. *Id.* at 660-64.

230. *Id.* at 657-58.

ideological. Further, we reported that with respect to Title VII, the Court relied on language canons in interpreting more complicated procedural facets of that ideologically charged statutory scheme. Vote margins in these Title VII procedural cases also tend to be wider than for Title VII decisions in general.[231]

One case that generally comports with this public choice account is *Universities Research Ass'n Inc. v. Coutu*,[232] a unanimous 1981 decision authored by Justice Blackmun construing a pre-New Deal prevailing wage law. In *Coutu*, the Court held that the Davis-Bacon Act[233] precludes a private right of action for back wages under a contract that has been administratively determined not to call for Davis-Bacon work. In addition to the arcane nature of the subject matter,[234] the Court resolved the case on very narrow grounds. Justice Blackmun relied in part on the *expressio unius* canon, observing that because Congress had authorized a private damages remedy for back wages under certain conditions, the Court was unwilling to infer such a remedy under the different circumstances of this case.[235] The federal contractor had argued that there could be no implied right of action even for a contract that contained specific Davis-Bacon wage stipulations,[236] and Justice Blackmun recognized that the majority's reasoning might well foreclose any implied right of action under the statute.[237] Nevertheless, he confined the Court's holding to a very small universe—employees who seek judicial enforcement of Davis-Bacon wage protections with respect to contracts that never mention a right to receive Davis-Bacon wage rates. It may be that the Court's willingness to duck potentially troubling larger issues[238] contributed to unanimity as much as the technical and

231. Of seventeen Title VII "procedural" language canon cases (*see supra* text accompanying notes 146-49) eight were unanimous and four were decided by wide margins; this combined total amounts to 71 percent (twelve of seventeen). For the ninety-one other Title VII cases, the proportion of unanimous and wide margin votes was somewhat lower (forty-eight of ninety-one, or 53 percent).

232. 450 U.S. 754 (1981).

233. Act of Marcb 3, 1931, ch. 411, § 1, 46 Stat. 1494 (codified as amended at 40 U.S.C. § 276a(a)) (requiring that construction contracts pay no less than prevailing wage rates, as determined by Secretary of Labor).

234. The Davis-Bacon Act is a 1931 statute regulating wage rates on federal construction contracts, and it is rarely litigated at the Supreme Court level. *Coutu* was the only Davis-Bacon decision in our 632-case dataset.

235. *Coutu*, 450 U.S. at 773.

236. *Id.* at 768-69.

237. *Id.* at 769 n.19.

238. In addition to the broader implied right of action issue referred to in the text, the Court also declined to address a second argument made by the federal contractor: whether federal courts have jurisdiction to review coverage and classification determinations made by the Secretary of Labor. *Id.* at 768-69 & n.18.

unglamorous nature of the subject matter. The majority opinion also relied on plain meaning of the text, specific legislative history, general legislative purpose, and agency deference to support its result.[239]

A decade later, in *Adams Fruit Co. v. Barrett*,[240] a unanimous Court invoked the *expressio unius* canon to help justify a private right of action under a comparably obscure federal statute, the Migrant & Seasonal Agricultural Workers Protection Act (AWPA).[241] The issue in *Barrett* was whether the right of action expressly conferred on migrant workers under the AWPA is effectively conditioned by the exclusivity provisions in state workers' compensation laws. The employer pointed to the Act's motor vehicle safety provisions, which permit employers to satisfy AWPA insurance policy and liability bond requirements through state workers' compensation insurance.[242] The employer contended that it made no sense for Congress to have waived federal insurance coverage requirements when workers' compensation was provided and yet allow migrant workers to pursue cumulative remedies under workers' compensation laws and AWPA.[243]

Justice Marshall, writing for the Court, declined to allow the enforcement provisions of AWPA to be restricted by language in a separate title of the Act. Emphasizing that the enforcement provisions themselves provided one express limitation (unrelated to workers' compensation schemes) on the availability of relief, Justice Marshall reasoned that Congress's failure to include a further limitation was highly probative as a matter of basic statutory construction.[244] While relying on the Act's language and structure to preserve this AWPA right of action, Marshall did circumscribe the implications of the Court's holding by adding that any AWPA damages

---

239. *Id.* at 771-73 (relying on language of Act); *id.* at 773-780 (relying extensively on history of 1931 Act and 1964 amendment); *id.* at 782-83 (relying on Act's purpose of promoting efficiency and certainty in government contracting); *id.* at 783 (relying on respect for Secretary's detailed regulations fostering uniformity in contract coverage). This use of language canons as part of a broader web of interpretive resources is fairly typical of Justice Blackmun's opinion-writing methodology. *See supra* notes 173-177 and 197-201 and accompanying text.

240. 494 U.S. 638 (1990).

241. Pub. L. No. 97-470, 96 Stat. 2583 (codified as amended at 29 U.S.C. § 1801 et. seq. (2000)). This is the only AWPA case in our dataset.

242. *Barrett*, 494 U.S. at 643-44.

243. *Id.* at 644.

244. *Id.* at 644-45. The express provision in AWPA called for limiting the amount of damages based on whether "an attempt was made to resolve the issues in dispute before the resort to litigation." *Id.* at 644 (quoting 29 U.S.C. § 1854(c)(2)). Justice Marshall noted that the Department of Labor had taken the opposite view in its regulations, but he refused to defer to the agency in light of the Act's linguistic and structural clarity, as well as his determination that regulating the scope of judicial power granted by the AWPA was a matter Congress had not delegated to the Department. *Id.* at 649-50.

award could be reduced in light of a farmworker's receipt of state workers' compensation benefits.[245]

Both *Coutu* and *Barrett* involved a unanimous Court relying on the *expressio unius* canon to help justify its interpretation of an obscure workplace standards statute in a decision with very limited practical consequences.[246] There are numerous additional decisions that conform to this general picture. Some arise under similar minimum standards statutes while others interpret certain provisions of ERISA; the Court frequently relies on language canons besides *expressio unius* to help explain its holdings in such decisions.[247]

While Professors Macey and Miller suggest that judges tend to opt for such language canon reliance in cases where the policy choices of the political branches are essentially unknown,[248] that overstates the matter. The Court in these cases often invokes purposive justifications—gleaned from legislative record evidence or imputed to Congress—thereby attributing its result in part to the policy preferences of the legislative branch.[249] In addition, the relevant executive branch agency has sometimes advanced its own policy-based interpretation to which the Court is simply unwilling to defer.[250] Still, in cases interpreting procedural or remedial aspects of relatively lackluster federal laws, where the outcome is at best of modest

---

245. *Id.* at 651 n.5.

246. The result in *Coutu* was conservative (prohibiting the employee's federal lawsuit) while in *Barrett* the outcome was liberal (preserving the employee's federal cause of action).

247. *See, e.g.*, Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co., 513 U.S. 414 (1995) (relying *inter alia* on Whole Act Rule to hold unanimously that under Multiemployer Pension Plan Amendments Act, interest on the charge for withdrawal from a pension plan begins to accrue on first day of plan year following withdrawal rather than last day of plan year preceding withdrawal); Moreau v. Klevenhagen, 508 U.S. 22 (1993) (relying *inter alia* on Whole Act Rule to hold unanimously that under FLSA section regulating comp time for government employees, a public employer in a right to work state may provide comp time pursuant to individual agreements with each employee, even though the employees have designated a union representative to negotiate for such arrangements); Comm'r. of Internal Revenue v. Keystone Consol. Indus. Inc., 508 U.S. 152 (1993) (relying in part on canon that same words used in different parts of a statute are meant to have the same meaning to hold (by 8-1 margin) that an employer's transfer of certain property to a defined benefit plan in partial satisfaction of its funding obligation was a prohibited "sale or exchange" under ERISA).

248. Macey & Miller, *supra* note 11, at 659.

249. Univs. Research Ass'n Inc. v. Coutu, 450 U.S. 754 773-80, 782-83 (1981); *Keystone*, 508 U.S. at 160; *Schlitz*, 513 U.S. at 428-30.

250. Adams Fruit Co. v. Barrett, 494 U.S. 638, 649-50 (1990); *see also* Potomac Electric Power Co. v. Dir., Office of Workers' Comp. Programs, 449 U.S. 268, 275-76, 277-80 (1980) (relying in part on *in pari materia* canon and rejecting agency's position on scope of employee's statutory recovery rights under LHWCA); Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477-81 (1992) (relying in part on Whole Act Rule and rejecting agency interpretation of scope of LHWCA's forfeiture provision for settlement of third party claims).

practical importance, the Court is especially inclined to use maxims of linguistic meaning and structure to help justify its results.

It may be, as Macey and Miller suggest, that such facially content-neutral rationales help to insulate the Justices from error or embarrassment in areas where they feel less confident about either their substantive expertise or their policy preferences. It seems more likely, however, that the Justices in these cases are less personally invested rather than less confident. Their willingness to invoke the language canons is due—consciously or subconsciously—to diminished appetite for the subject matter, an understanding that the practical stakes are not terribly high, or some combination of these factors.

Apart from the weaker substantive interest such cases generate, the relatively precise and detailed nature of the provisions at stake also may help to explain why the Justices rely more often on language canons. In both *Coutu* and *Barrett*, the Court was called upon to construe intricate statutory terms covering the relationship between possible private rights of action and the roles of other regulatory actors. The elaborately complicated aspects of these interpretive controversies stand in contrast to instances of Congress's more open-textured drafting. Statutory directives that simply prohibit employers from "restrain[ing] or coerc[ing]" workers who seek to organize a union,[251] or from "discriminat[ing]" against employees because of race or sex,[252] effectively delegate broader interpretive authority to agencies and courts. Such provisions lack the more particularized verbiage that invites close linguistic analysis. Further, the controversies addressing Congress's more detailed and close-textured legislative products often require interpretation of jurisdictional, remedial, or procedural provisions that are perceived to have analogs in other statutes or elsewhere within the same statute. In these circumstances, the Justices may find the cross-referential nature of language canon analysis a relatively comfortable methodological fit.

This explanation, keyed to the specificity and structural context of the provision at issue, may apply as well for subject matter areas that are not at all esoteric, such as Title VII. We described earlier our finding that the Court's reliance on language canons when interpreting Title VII is strongly associated with procedural and technical aspects of that ideologically sensitive statute.[253] A good

251. 29 U.S.C. § 158(a)(1) (2000).

252. 42 U.S.C. § 2000e-2(a)(1) (2000).

253. *See supra* notes 145-150 and accompanying text.

example of this association is *Robinson v. Shell Oil Co.*,[254] a unanimous 1997 decision authored by Justice Thomas.

In *Robinson*, the issue presented was whether Title VII's anti-retaliation provision, Section 704(a), protects former employees as well as current ones. A former employee alleged that Shell Oil had given him a poor reference in retaliation for his having previously filed a race discrimination charge with the EEOC.[255] The language of Section 704(a) prohibits discrimination by an employer "against any of his employees or applicants for employment" who have filed a charge, testified, or otherwise assisted in an EEOC investigation.[256] The Court of Appeals had held that this language was clear on its face: "employees" referred only to current employees, and an anti-retaliation claim by a former employee was therefore not cognizable.[257] The Supreme Court reversed, relying heavily on the Whole Act Rule while declining to make use of language canon analysis that pointed in the opposite direction.

Justice Thomas first determined that against the background of Title VII as a whole, the term "employees" in Section 704(a) was ambiguous with respect to excluding former employees. Thomas reasoned that neither the basic definition of "employee" within the Act nor treatment of the term in legal dictionaries included a clear temporal qualifier.[258] Importantly, he also recognized that in a number of other statutes, Congress had identified "former employees" as a class separate from current employees. In his view, however, this "prove[d] only that Congress *can* use the unqualified term 'employees' to refer only to current employees, not that it did so in this particular statute."[259] The Court thus rejected reliance on the linguistic maxim that Congress uses the same term consistently in different statutes, a canon that has attracted some scholarly criticism[260] but also frequent

254. 519 U.S. 337 (1997).

255. *Id.* at 339-40.

256. 42 U.S.C. § 2000e-3(a).

257. Robinson v. Shell Oil Co., 70 F.3d 325, 329-30 (4th Cir. 1995) (en banc).

258. *Robinson*, 519 U.S. at 341-42. Justice Thomas acknowledged that the Court only weeks earlier had interpreted the word "employees" appearing in a separate section of Title VII as referring to those having a *current* employment relationship, but he distinguished the prior holding because that different section included a present-tense qualifier in its discussion of "employees." *Id.* at 341 & n.2.

259. *Id.* at 341-42 (emphasis in original).

260. *See* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 234-40 (2000) (contending that such reliance on interstatutory references is prone to judicial manipulation and will unsettle bodies of federal law not before the court).

adherence from the Justices,[261] including in decisions that interpret Title VII.[262]

Instead, the Court focused on a number of other places in Title VII where the term "employees" plainly did encompass former employees, notably provisions specifying access to the statute's remedial mechanisms.[263] Consideration of this broader context, including the fact that Section 704(a)'s protection for filing a "charge" would seem inevitably to embrace charges by former employees alleging unlawful termination, led the Court to conclude that the genuinely ambiguous word "employees" in Section 704(a) should be read to cover former employees.[264] Justice Thomas then invoked legislative purpose as "further support" for the majority's position, observing that it would undermine the basic concept of anti-retaliation protections to hold that they expire as soon as an employee leaves the job or is terminated.[265]

In *Robinson*, as in many other procedural or jurisdictional Title VII decisions that rely on language canons, the Justices are well aware of the policy implications involved.[266] Moreover, these implications are hardly unimportant in practical terms: a determination that anti-retaliation protections covered only current employees would presumably have had a severely chilling effect on individuals wishing to invoke agency procedures under the Act.[267] Still, Justice Thomas devotes almost all of his analysis to arguments about the meaning and structure of the statutory language, saving only his final two paragraphs for discussion of congressional purpose as supplemental reinforcement.

Admittedly, Justice Thomas—a textualist and frequent language canon user—may be especially inclined to dwell on parsing the language of key provisions and analyzing the interplay among

---

261. *See id.* at 180-203 (citing to multiple decisions between 1991 and 2000 in which use of what Buzbee calls the "one-Congress fiction" was a driving force in the result reached by the Court).

262. Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823 (1990).

263. *See Robinson*, 519 U.S. at 342-43 (referring to meaning of "employees" in Sections 706(g)(1), 717(b), and 717(c)).

264. *Id.* at 345.

265. *Id.* at 345-46.

266. *See, e.g.*, Swierkiewicz v. Sorema, 534 U.S. 506, 512-514 (2002) (invoking legislative purpose to support holding that is also justified by language canon reliance); Loeffler v. Frank, 486 U.S. 549, 555-56 (1988) (same); EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600-02 (1981) (same).

267. *See also* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115-18 (2002) (discussing policy implications of limitations period for hostile environment sexual harassment claims); *Loeffler*, 486 U.S. at 556-57 (addressing policy consequences of allowing prejudgment interest in suit against Postal Service).

detailed subparts of a complex statutory scheme. But the Court's comfort level with these refined language canon analyses extends to nontextualist Justices as well.[268] Language canon usage is inevitably a byproduct of assessing the statutory text, and this consideration is likely to occur early in the Court's interpretive reasoning processes. When the language of that text deals with procedural, jurisdictional, or remedial matters that recur in other statutory settings, or in different parts of the statute being construed, language canons seem to play a more important role.

In sum, it is unlikely that the Justices' more frequent language canon reliance, associated with several relatively obscure areas of substantive law and more generally with technical matters that are codified in some detail, occurs out of ignorance regarding the policy preferences of the other two branches, or out of a desire to avoid making a policy mistake. Rather, their reliance may well be a function of two other motives that are distinct yet overlapping.

The Justices' inclination to invoke language canons in this subset of cases would appear to reflect a relative lack of interest in certain esoteric subject matter areas and a relative comfort level with the intra and interstatutory frames of reference afforded by certain types of procedurally-related issues. It is even possible that the first of these motives may have helped to encourage the second, at least in cases that are decided with little or no dissent. The wide margin of support in many obscure or technical decisions may reflect the Justices' comparatively softer investment in "taking sides" on such matters. Justices adopting this somewhat more relaxed stance may then find it easier to embrace an interpretive approach that takes an aspirational view of congressional lawmaking as a linguistically integrated and harmonious enterprise.

B. Pessimists' Perspective: Tension Between Canons and Legislative History

Professors Ross and Rubin each have warned against the dangers that courts will use canons to frustrate readily discernible congressional intent.[269] Their concern reflects the existence of periodic tension between invocation of the canons and reliance on legislative history, a tension that has become more prominent in recent times.

---

268. *See, e.g.*, Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823-26 (1990) (majority opinion by Justice Stevens); *Loeffler*, 486 U.S. at 549, 558-63 (majority opinion by Justice Blackmun); *Associated Dry Goods Corp*, 449 U.S. at 590, 598-603 (majority opinion by Justice Stewart).

269. Ross, *supra* note 13, at 562; Rubin, *supra* note 13, at 580.

As Professor Manning observed in an article chronicling the revival of the canons, to the extent there are misgivings about "the judicial capacity to find . . . legislative intent or purpose, it may seem important, if not essential, to emphasize and develop effective rules of thumb to resolve the doubts that inevitably arise out of statutory language."[270] Our findings document a brisk competition involving these two interpretive approaches, in the connection between majority reliance on canons and dissent use of legislative history, and also the contrast between the rising influence of the canons as an interpretive justification and the Court's diminished reliance on legislative history.[271]

There is no intrinsic reason why the results of such tension should point in a single ideological direction. Legislative history at times reveals conflicting or overlapping motivations among members who supported enactment, and even those who bristle at Judge Leventhal's famously sardonic observation[272] would concede that legislative history may contain credible evidence of divergent rationales. To be sure, Justices Scalia and Thomas—frequent users of language canons—have publicly renounced relying on legislative history in their majority opinions. But this refusal, adopted and applied as a matter of principle, appears on its face to be ideologically neutral. Moreover, thirteen other Justices authoring majority opinions during the Rehnquist era continue to regard legislative history as potentially probative. They too are part of the sharply increased willingness to rely on both language and substantive canons, and Justices Scalia and Thomas have in fact contributed only modestly to our pool of majority opinions pitting canons against legislative history.[273]

Accordingly, it is striking to find such an overwhelmingly conservative set of results for the nineteen decisions in which majority reliance on canons clashes with dissent dependence on legislative

---

270. Manning, *supra* note 9, at 285.

271. *See supra* tbl.XII and accompanying discussion; *supra* text accompanying notes 123-133.

272. Judge Leventhal once referred to legislative history as a way of "looking over a crowd and picking out your friends." Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983). Notwithstanding this critical comment, Judge Leventhal regularly relied on legislative history in justifying his decisions while a member of the D.C. Circuit. *See, e.g.*, AFL-CIO v. Marshall, 570 F.2d 1030, 1036-38 (D.C. Cir. 1978); Natural Res. Def. Council v. Costle, 568 F. 2d 1369, 1373-76 (D.C. Cir. 1977); Envtl. Def. Fund v. EPA, 548 F.2d 998, 1014-15 (D.C. Cir. 1976).

273. Of the nineteen ideologically directional majority opinions referred to *supra* in note 223, Justices Scalia or Thomas authored a total of three. Of the ten majorities analyzed or referred to in this subpart, Justices Scalia and Thomas authored one each: the rest were written by Justices Kennedy (3), O'Connor (2), Rehnquist, White, and Powell.

history: eight of nine language canon cases and nine of ten substantive canon cases. We reported earlier the findings that in closely divided decisions the majority's reliance on canons tends to produce conservative outcomes,[274] and that canon reliance is significantly associated with greater dependence on legislative history in dissent.[275] Overall, this polarized pattern suggests that for an identifiable subset of divisive cases, the canons are being used by the Rehnquist Court to help produce a judicially desired set of policies, ignoring or sacrificing legislatively expressed preferences in the process. We consider in some detail five cases—three involving language canons and two substantive canons—that present specific examples of this pattern.

1. Language Canon Reliance

In *Mertens v. Hewitt Associates*,[276] a closely divided 1993 ERISA decision, the Court held that a nonfiduciary who knowingly takes part in the breach of a fiduciary duty imposed under the Act is not liable for consequent monetary losses suffered by employee benefit plan participants. The case involved a class of former salaried employees at Kaiser Steel who alleged that they had received substantially reduced pensions.[277] Their claim against Hewitt, the plan actuary, was for a breach of professional duties: Hewitt's knowing use of flawed actuarial assumptions and its failure to disclose that Kaiser had not adequately funded the plan resulted in there being insufficient assets to cover the retiree's fully vested pensions.[278] The question before the Court was whether Section 502(a)(3) of ERISA, which authorizes plan participants to sue for "appropriate equitable relief to redress . . . violations,"[279] covered an action for

274. *See supra* tbl.XI.

275. *See supra* tbl.XII and accompanying discussion. The tension between canons and legislative intent takes on a more subtly ideological flavor when the two interpretive resources have inverted roles. Of the eight contested decisions in which the majority (but *not* dissent) relied on legislative history while the dissent invoked *language* canons, seven reached liberal results. *See, e.g.*, Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003); West v. Gibson, 527 U.S. 212 (1999); Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996). Of the five contested decisions in which the majority (but *not* dissent) relied on legislative history while the dissent invoked *substantive* canons, four reached conservative results and the fifth was indeterminate. *See, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992); FMC v. Holliday, 498 U.S. 52 (1990).

276. 508 U.S. 248 (1993).

277. *Id.* at 250. For a thoughtful contemporary analysis of *Mertens* that adopts a perspective similar to the authors', see Janice R. Bellace, *The Supreme Court's 1992-93 Term: A Review of Labor and Employment Law Cases*, 9 LAB. LAWYER 603, 613-17 (1993).

278. *Mertens*, 508 U.S. at 250-51.

279. 29 U.S.C. § 1132(a)(3) (2000).

monetary damages against nonfiduciaries in these liability-producing circumstances.[280]

Writing for a five-member majority, Justice Scalia held that the answer was no.[281] The majority opinion relied heavily on plain meaning and language canons. Justice Scalia insisted that the term "equitable" in connection with "relief" should be understood to cover only remedies traditionally available at equity, not monetary damages that constitute *legal* relief.[282] He then made use of the "consistent usage across statutes" canon, emphasizing that the Court had construed very similar language in Title VII to foreclose access to compensatory or punitive damages.[283] Justice Scalia also relied on the Whole Act Rule, reasoning that if "equitable" relief in Section 502(a)(3) were construed to include damages, this would vitiate the meaning of distinctions Congress had drawn elsewhere in ERISA between "equitable" and "legal" relief.[284] The majority acknowledged that under the common law of trusts, courts of equity had authority to award money damages in actions by beneficiaries, both against a trustee for breach of trust and against third parties who knowingly participated in the breach.[285] The Court reiterated, however, that "equitable relief" must mean something less than "all relief," and accordingly declined to impose a "strained interpretation" on Section 502(a)(3).[286]

The dissent, written by Justice White, relied heavily on legislative history and purpose to support its argument for a broader meaning of the phrase "equitable relief."[287] Justice White pointed to comments in both House and Senate committee reports and also to remarks by chief Senate sponsor Senator Williams; these statements reflected an intent that the courts rely on settled precedents under the common law of trusts in shaping the contours of breach of trusts law contemplated under Section 502(a)(3).[288] It was well established when

280. The Court assumed *arguendo* that the facts alleged would qualify as a violation of ERISA by nonfiduciary Hewitt, although the majority expressly reserved the liability question for another day. *Mertens*, 508 U.S. at 254-55.

281. *Id.* at 251-63. Joining Justice Scalia's opinion were Justices Blackmun, Kennedy, Souter, and Thomas. Justice White's dissent was joined by Justices Rehnquist, Stevens, and O'Connor. The presence of Blackmun and Souter in the majority, and Rehnquist and O'Connor in dissent, makes this a somewhat unusual lineup.

282. *Id.* at 255.

283. *Id.*

284. *Id.* at 257-59.

285. *Id.* at 256.

286. *Id.* at 258 n.8, 261.

287. *Id* at 263-74.

288. *Id.* at 264-65 (relying on H.R. REP. NO. 93-533 (1973); at 11, S. REP. NO. 93-527, at 29 (1973); 120 CONG. REC. 29928, 29932 (1974) (statement of Sen. Williams)).

ERISA was being enacted that the traditional "equitable" relief available to trust beneficiaries included compensatory damages, and the dissent accordingly maintained that Section 502(a)(3)'s reference to "appropriate equitable relief" was meant to cover make-whole monetary awards, "equity's routine remedy" for breaches of trust like the one at issue here.[289] Indeed, the dissent added, given Congress's overriding purpose of protecting participants in ERISA-governed plans, and the broad preemption of state law in other parts of the Act, it would be nothing less than subversive to construe key remedial language so as to leave the protected class worse off than they had been before enactment of ERISA.[290]

As noted above, Justice Scalia agreed with the dissent that plan participants would have been entitled to recover under the common law precedents in effect when ERISA was enacted. The majority also acknowledged the dissent's reliance on legislative purpose, but Justice Scalia referred disparagingly to "vague notions of a statute's 'basic purpose' [as being] inadequate to overcome the words of its text regarding the *specific* issue under consideration."[291] The majority made no effort to confront the evidence of legislative intent invoked by the dissent, evidence the Court had found probative on other occasions.[292] Although Justice White offered a textual reading that took issue with the majority's plain meaning analysis,[293] this too did not dissuade Justice Scalia from adhering to his linguistic approach.

The majority's one concession to the possibility that it might be thwarting congressional intent came in the final paragraph of its opinion. Justice Scalia posited a "tension" between ERISA's "primary goal" of protecting beneficiaries and a "subsidiary goal" of containing pension plan costs—notably defraying the higher insurance costs that would be imposed on actuaries—and he concluded that the text here favored the subsidiary purpose.[294] There is certainly a prospect of

289. *Id.* at 265-66.

290. *Id.* at 266-67. The beneficiaries end up worse off because ERISA's broad preemption clause precludes formerly available state law actions. *Id.* at 267 n.2; *id.* at 261.

291. *Id.* at 261 (emphasis in original); *see also* John H. Langbein, *What ERISA Means By "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317, 1354-55 (2003) (criticizing Court for refusing to confront ERISA's remedial purpose and for relying on "specificity myth" that statute's careful and comprehensive drafting warrants excluding all details of practice not spelled out in text).

292. *Mertens*, 508 U.S. at 264 (citing to Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989) and Central States Southeast and Southwest Areas Pension Fund v. Cent. Transp. Inc., 472 U.S. 559, 570-71 (1985)).

293. *Id.* at 267-69.

294. *Id.* at 263.

increased transaction costs flowing from the federal imposition of monetary remedies on nonfiduciaries. Indeed, such a prospect is present for any ERISA standard that has the effect of benefiting employees and retirees. The majority, however, pointed to no evidence that Congress was concerned about these particular costs when key legislative players urged reliance on remedial standards established under the common law of trusts. Instead, by elevating what it conceded was the "subsidiary" goal of cost-containment over the primary goal of protecting plan participants, the majority seemed to be relying on its own policy preferences favoring business efficiency.[295] Both sides agree that the Court's result leaves Mertens (and large numbers similarly situated) worse off than they were before ERISA. One is hard pressed not to view such results as frustrating the Act's generally recognized purpose, and the majority's linguistically driven reasoning is largely indifferent to that concern.[296]

Our second example, *Sutton v. United Air Lines*,[297] involved a divided Court in 1999 interpreting the Americans With Disabilities Act ("ADA")[298] to mean that corrective and mitigating measures should be considered when determining whether an individual is disabled, thereby restricting the Act's potential scope of coverage. Sutton and her twin sister, who were afflicted with severe myopia, had applied for jobs with United as commercial pilots. Although they met the company's basic qualifications (both were experienced, FAA-certified pilots), they were not offered a position because they did not meet United's minimum standard for uncorrected visual acuity.[299] The main issue presented was whether, in interpreting the Act's applicable definition of disability—"a physical or mental impairment that substantially limits one or more of the major life activities"[300]—a

295. *See* Bellace, *supra* note 277, at 616.

296. Proponents of the linguistic approach have maintained that if the Court's close textual analysis frustrates congressional purpose, Congress can take the salutary step to clarify its intended meaning. *See supra* note 38 and accompanying text. As one of us has argued in an earlier article, this invitation to clarify the often-inconclusive quality of statutory language fails to appreciate the institutional and political complexities endemic to the modern legislative enterprise—Congress generally cannot enact statutes embodying tbe degree of precision desired by textualists. In addition, the textualist approach imposes substantial opportunity costs that are likely to undermine Congress's efforts to manage its own legislative agenda. *See* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 16-26, 104-05 (1994).

297. 527 U.S. 471 (1999).

298. 42 U.S.C. § 12101 et. seq. (2000).

299. *Sutton*, 527 U.S. at 475-76.

300. 42 U.S.C. § 12102(2)(A). The Court also addressed a separate aspect of this definition—whether *Sutton* should be "regarded" as having a substantial impairment under 42 U.S.C. §

court should take account of corrective measures (such as eyeglasses, medications, or prosthetic devices) that mitigate the individual's impairment.

Justice O'Connor wrote for seven members of the Court, concluding that the approach adopted by the EEOC and the Department of Justice, that individuals were to be evaluated in their hypothetical uncorrected state, was an impermissible interpretation of the ADA.[301] Relying heavily on the Whole Act Rule, the majority reasoned that the ADA was unambiguous on this issue and therefore declined to consider the available legislative history.[302]

The Court discerned clear meaning based in part on the phrase "substantially limits," which in its view mandated individualized inquiry into whether a particular person is actually disabled, as opposed to the EEOC's "speculat[ive]" approach as to how an uncorrected impairment tends to affect groups of people.[303] But the lynchpin for the majority opinion was the ADA's findings section, which declared that "some 43,000,000 Americans have one or more physical or mental disabilities."[304] Although Justice O'Connor expressed uncertainty about the origins of this forty-three million figure, she reasoned that it could not possibly be squared with an "uncorrected" approach that would cover one hundred million people or more.[305] In order to avoid rendering the forty-three million number meaningless, the Court concluded that this figure "gives content to the ADA's terms, specifically the term 'disability.' "[306]

In dissent, Justice Stevens disputed the majority's position that the text was unambiguous and contended that it was therefore proper to consult the Act's legislative history.[307] Writing for himself and Justice Breyer, Stevens observed that eight of nine circuits to address the issue, and all three executive agencies to construe the language, had concluded that Congress intended disability determinations to focus on individuals in their unmitigated condition.[308] He found this widely shared conclusion wholly unsurprising given the readily available legislative history that was directly on point.

12102(2)(C). We do not discuss that part of the majority opinion, as it does not rely on language canons. *Sutton*, 527 U.S. at 489-94.

301. *Sutton*, 527 U.S. at 482.

302. *Id.*

303. *Id.* at 482-84.

304. *Id.* at 484-87.

305. *Id.* at 487.

306. *Id.*

307. *Id.* at 497-99.

308. *Id.* at 495-96.

Justice Stevens quoted extensively from House and Senate committee reports on the bill that became the ADA. These reports explicitly and repeatedly discuss various examples of correctable impairments that are meant to be covered under the Act.[309] The reports also cite with approval the fact that the ADA definition of disability, borrowed almost verbatim from the Rehabilitation Act of 1973, had been interpreted to cover such correctable impairments by lower courts applying that earlier definition.[310] In light of this powerful legislative record, Justice Stevens maintained that it was preferable to view the reference to forty-three million people as a speculative estimate rather than wrapping the Act's critical definition around that figure.[311] He reinforced this view by noting that the majority definition might well bring the scope of coverage well below forty-three million.[312]

The majority and dissent in *Sutton* essentially draw conflicting inferences from the same definitional text. While they agree that Congress contemplated an individualized approach to coverage, they differ about the sequence for arriving at such individual determinations. Justice O'Connor, insisting that the Act focuses on persons in a "corrected" condition, views those who are epileptic or have artificial limbs as potentially covered by the Act if they are found to be "substantially limited" even when using corrective medication or devices.[313] By contrast, Justice Stevens, who asserts that the Act contemplates assessment of "uncorrected" conditions, regards persons with routine eyeglasses as potentially excluded upon a determination that even in their uncorrected state they are only modestly or trivially impaired.[314]

Disagreements among the Justices about the implications of a less than precise text are fairly common. Yet in this instance, there is legislative history that is strikingly definitive and uncontroverted on the very implications in dispute. By holding that the definitional issue is unambiguously resolved based on reference to a numerical figure in the findings section of the Act, the majority relies on a

309. *Id.* at 499-501 (quoting Senate and House reports expressly stating that persons who are hard of hearing, or who suffer from epilepsy, heart disease, or diabetes, are covered under the first prong of the definition of disability (42 U.S.C. § 12102(2)(A)), even thougb their medical conditions may be corrected through hearing aids or controlled througb medication).

310. *Id.* at 501 (relying on Senate Report that cites Third Circuit decision with approval).

311. *Id.* at 503, 511.

312. *Id.* at 512.

313. *Id.* at 488.

314. *Id.* at 496.

structural canon to foreclose all consideration of specific legislative intent. Once again, the result can be seen as undermining that intent.

Our final language canon example is *Circuit City Stores, Inc. v. Adams*,[315] a 2001 decision interpreting the Federal Arbitration Act ("FAA").[316] In *Circuit City*, a consumer electronics company required job applicants to agree to final and binding arbitration of future job-related disputes as a condition of their employment. Adams, a salesman, had signed the agreement but he later filed an employment discrimination lawsuit in court; Circuit City then sought to compel arbitration under the FAA.[317] The Supreme Court had to decide whether Section 1 of the statute, exempting "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," [318] applied to all employment contracts. The Court had earlier interpreted the FAA's basic coverage language—providing for the enforceability of written arbitration provisions that are part of "any maritime transaction or a contract evidencing a transaction involving commerce"[319]—as signifying Congress's intent to regulate to the full extent of its commerce power.[320] Writing for five members of the Court, Justice Kennedy concluded that the Section 1 exemption was much narrower, covering only employment contracts of transportation workers.

Justice Kennedy relied primarily on language canons and plain meaning analysis; as was true in *Sutton*, the majority found the text at issue to be so unambiguous that it refused to consider the legislative history.[321] The language canon the majority found highly probative was *ejusdem generis*, which calls for a general term to be interpreted to embrace only the class of objects enumerated in more specific terms that accompany it.[322] Because the residual clause "any other class of workers engaged in interstate commerce" is preceded by reference to two specific types of transportation workers, the majority reasoned that the clause should be confined in scope to those employed in transportation-related enterprises.[323] Justice Kennedy reinforced this language canon reliance by conducting a comparative linguistic analysis of the phrases Congress had chosen to modify "commerce" in

315. 532 U.S. 105 (2001).
316. 9 U.S.C. § 1 et. seq. (2000).
317. *Circuit City*, 532 U.S. at 109-10.
318. 9 U.S.C. § 1.
319. 9 U.S.C. § 2.
320. *See* Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 277-80 (1995).
321. *Circuit City*, 532 U.S. at 119.
322. *Id.* at 114-15.
323. *Id.* at 115.

Sections 1 and 2 of the FAA. He stressed that the phrase "involving commerce" used in the Act's basic coverage section (Section 2) must be construed broadly, connoting an almost passive accretion of jurisdiction to the outer limits of Congress's authority under the Commerce Clause.[324] By contrast, the phrase "engaged in commerce" used in the Act's exemption section (Section 1) signifies a more limited scope of jurisdiction, triggered only by active participation in commercial employment.[325]

Four members of the Court used two separate dissents to take strong issue with the majority's invocation of an unambiguous text.[326] Justice Souter contended that the different phrasings of the two commerce provisions should not be given any weight. In his view, it was most plausible to infer from the text as a whole that Congress meant for the basic coverage provision and the employment exemption provision to be coextensive.[327] Pointing to the "context of the time," Justice Souter observed that when Congress acted in 1925 its regulatory power was confined under prevailing Supreme Court doctrine to the active operations of interstate commerce.[328] References to seamen and railroad workers in Section 1 should therefore be understood as something besides mere ahistorical illustrations of how language can be parsed. Instead, argued Justice Souter, Congress's evident intent in Section 1 was "to exclude to the limit of its power to cover employment contracts in the first place, and it did so just as clearly as [Section 2] showed its intent to legislate to the hilt over commercial contracts at a more general level."[329] Justice Souter further noted that *ejusdem generis*, like other canons, "is a fallback" to be put aside "if there are good reasons not to apply it."[330] He found such reasons, pointing to the Act's legislative history as well as the bizarre implications of holding that Congress in 1925 had targeted for exemption only those employees it most obviously *could* regulate while leaving regulated all other employees over whom its authority was highly suspect.[331]

---

324. *Id.*

325. *Id.* at 115-16.

326. *Id.* at 124-40. Justice Souter's dissent (joined by Justices Stevens, Breyer, and Ginshurg) contested the majority's textual analysis. *Id.* at 133-40. Justice Stevens's dissent (joined by Justices Souter, Breyer, and Ginsburg) focused on the FAA legislative history. *Id.* at 123-44.

327. *Id.* at 135-36.

328. *Id.* at 136.

329. *Id.*

330. *Id.* at 138.

331. *Id.* Justice Kennedy countered that the exclusion of seamen and railroad employees need not be viewed as irrational or anomalous, because by 1925 Congress already had enacted

Justice Stevens's dissent analyzed the FAA legislative history that the majority had determined was irrelevant.[332] When the FAA was introduced in response to judicial refusals to enforce commercial arbitration agreements, the bill was understood by members of Congress to cover commercial and admiralty contracts.[333] Although the bill's supporters did not anticipate that it would extend to employment contracts at all, organized labor objected strongly to the possibility of such coverage.[334] In response, Secretary of Commerce Herbert Hoover suggested adding language to exempt employment contracts: when that suggested language became the relevant portion of Section 1, organized labor withdrew its opposition and advised its members that Congress had indeed "exempted labor from the provisions of the law."[335] Justice Stevens concluded that by reading the disputed exemption language to be confining rather than comprehensive, the majority had in fact "defeat[ed] the very purpose for which [the] provision was enacted."[336]

The majority's canon-based reasoning is difficult to defend in content-neutral terms. Even if one does not embrace Justice Souter's interpretation, promoting a coherent interaction between the FAA's coverage and exemption provisions, it seems impossible to view the majority's linguistic analysis as so obviously correct that it renders irrelevant any consideration of legislative intent. By ignoring legislative history, the majority has accomplished the exact opposite of what the enacting Congress intended. Further, by construing this 1925 text to allow arbitrators instead of courts to resolve employees' claims of discrimination against their employers, the majority has undermined more recently articulated congressional preferences favoring judicial access to vindicate specific federal civil rights protections.[337] In this regard, many nationally prominent interest

---

specific legislation providing for arbitration of seamen's disputes and it was contemplating such legislation for railroad employees (eventually enacted in 1926). *Id.* at 120-21. This argument did not, however, address the other half of Justice Souter's asserted anomaly—an almost casually imposed national coverage for all other workers outside the transportation industry while the most "regulable" employees were excluded.

332. *Id.* at 124-28.

333. *Id.* at 125 (citing to floor statements and hearing testimony from key legislative participants).

334. *Id.* at 127-28 (citing to legislative history and related public statements).

335. *Id.*

336. *Id.* at 128.

337. *See* Charity Robl, *Recent Developments*: Circuit City Stores, Inc. v. Adams, 17 OHIO ST. J. ON DISP. RESOL. 219, 226 (2001) (suggesting that Court's decision undermines congressional intent under Title VII, ADEA, and ADA); Harriet Chaing, *High Court Limits Workers' Rights to File Lawsuits*, S.F. CHRONICLE, Mar. 22, 2001, at A1 (quoting leading employees' attorney that in *Circuit City* decision, the Justices "have gutted the nation's civil rights and labor laws"); Robert

groups filed *amicus curiae* briefs in *Circuit City*, and the Justices presumably understood the policy stakes of the issue before the Court.[338] Under all these circumstances, the putatively neutral interpretive approach followed in *Circuit City* seems an especially stark instance of judicial policymaking.[339]

2. Substantive Canon Reliance

Unlike language canons, substantive canons purport to reflect judicially expressed policy preferences. Given the Court's gradual shift in a conservative direction during this thirty-four year period,[340] one should perhaps expect to find in divided cases a prevailing conservative cohort of Justices who often embrace substantive canons that reinforce their own ideological perspective. It may, therefore, be less surprising that majority reliance on substantive canons in the face of dissent dependence on legislative history points so powerfully in a conservative direction, especially during the Rehnquist era.

One substantive canon prominently associated with the Court's conservative majority since the mid-1980s is the "superstrong clear statement rule" promoting constitutional norms of federalism.[341] As formulated by the Court, the canon provides that unless Congress has been unmistakably clear in text that it means to limit the states' core sovereign authority so as to alter "the usual constitutional balance," the Court will interpret the federal statute as not having accomplished that purpose. Our dataset includes decisions relying heavily on this canon to hold that Congress was not sufficiently clear in its enacted text so as to limit the states' sovereign authority under Section 504 of

---

A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public Law Disputes*, 1995 ILL. L. REV. 635, 677-81 (1995)

338. *See Circuit City*, 532 U.S. at 108 (listing nine amicus briefs supporting employer's position from *inter alia* Chamber of Commerce, Securities Industry Association, and Society for Human Resource Management, and eight amicus briefs supporting employee's position from *inter alia* Lawyers Committee for Civil Rights Under Law, American Association of Retired Persons, and Association of Trial Lawyers of America. In the interests of full disclosure, we note that one of us (Brudney) was a signatory on an amicus brief filed by a group of law professors supporting the employee position.

339. While our three language canon decisions are adequately illustrative, there are other comparable examples. *See, e.g.*, Barnhart v. Sigmon Coal Co. Inc., 534 U.S. 438 (2002) (relying on *expressio unius* canon in interpreting Coal Industry Retiree Health Benefits Act of 1992, contrary to legislative history and agency position); NLRB vs. Health Care & Ret. Corp. of Am., 511 U.S. 571 (1994) (relying on Whole Act Rule in interpreting National Labor Relations Act, contrary to legislative history and agency position).

340. *See supra* note 207 and accompanying text.

341. ESKRIDGE., FRICKEY & GARRETT, *supra* note 35, at 889.

the Rehabilitation Act,[342] under Section 1983 of the 1871 Civil Rights Act,[343] or pursuant to Section 11(f) of the Age Discrimination in Employment Act.[344] The majority opinion in each of these cases deems legislative history irrelevant in light of its stringent clear statement approach.[345] In each case, a dissent points to legislative history as evidencing Congress's clear understanding that it meant to subject states to the sovereign authority of Congress.[346]

The Court's superstrong clear statement rule protecting states' sovereign authority has drawn considerable attention from legal scholars. Critics have contended that the imposition of this canon allows the Court to undermine what at time of enactment was settled congressional intent, and also to circumvent the Court's own constitutional precedent holding that our federal political structure adequately protects the states' core sovereignty interests.[347] Because debate about the normative implications of the canon has been fully joined elsewhere, we will not dwell on this trio of decisions. What matters for our purposes is that the canon on its face is indifferent to evidence of congressional intent as expressed in legislative history, and that a conservative majority has regularly relied on it to ignore—and effectively reject—such evidence.

In addition to divided decisions invoking the superstrong clear statement canon, a number of majority opinions rely on other substantive canons in the face of legislative history indicating a settled congressional preference for a different result. We describe two of those opinions here.

In *Patterson v. McLean Credit Union*,[348] the Court addressed the meaning of a Civil War era civil rights statute, providing in relevant part that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[349] Writing for five members, Justice Kennedy concluded that this provision, now codified at 42 U.S.C. Section 1981, prohibits race

342. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242-46 (1985) (holding that Congress failed to abrogate states' Eleventh Amendment immunity).

343. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 65-67 (1989) (holding that Congress failed to subject states to liability as "persons").

344. *See* Gregory v. Ashcroft, 501 U.S. 452, 460-67 (1991) (holding that Congress failed to subject appointed state judges to mandatory retirement).

345. *Atascadero*, 473 U.S. at 243; *Will*, 491 U.S. at 65; *Gregory*, 501 U.S. at 466-67.

346. *Atascadero*, 473 U.S. at 248-50 (Brennan, J., dissenting); *Will*, 491 U.S. at 83-85 (Brennan, J., dissenting); *Gregory*, 501 U.S. at 489-93 (Blackmun, J., dissenting).

347. *Gregory*, 501 U.S. at 477-78 (White, J., dissenting in part); ESKRIDGE, FRICKEY, & GARRETT, *supra* note 35, at 901-02; Colker & Brudney, *supra* note 122, at 134-36.

348. 491 U.S. 164 (1989).

349. 42 U.S.C. § 1981(a).

discrimination only in the initial formation of an employment contract, not in the employer's post-formation conduct.[350] Accordingly, the majority held Patterson's claim for racial harassment on the job to be nonactionable under Section 1981.[351] Justice Kennedy relied primarily on a plain meaning analysis, maintaining that the right to "enforce" an employment contract extends only to conduct by the employer that impairs an employee's ability to enforce his established contract rights.[352] Racial harassment on the job does not qualify as such an impairment; rather, it is "post-formation conduct . . . relating to the terms and conditions of continuing employment."[353]

The majority supplemented its literal meaning approach through reliance on the substantive presumption against a federal invasion of traditional state functions. Justice Kennedy noted that to allow Section 1981 to cover racial harassment, even harassment triggering a constructive discharge, would in essence confer federal status on all state law claims for breach of contract that allege racial animus.[354] Although he was prepared to do so if Congress had directed such a result, Justice Kennedy invoked the rule that absent such direction, "we should be and are 'reluctant to federalize' matters traditionally covered by state common law."[355]

In dissent, Justice Brennan criticized the majority's "formalistic method of interpretation" as incompatible with specific evidence of congressional intent.[356] He pointed to statements in the original legislative history to Section 1981, indicating that Congress meant to encompass post-contractual conduct such as discriminatory punishment and abusive mistreatment on the job.[357] Justice Brennan also relied on legislative history to Title VII, specifically the defeat of a 1972 amendment by Senator Hruska that was expressly intended to make Title VII the exclusive remedy for racially discriminatory treatment on the job.[358] Congress debated and eventually rejected the Hruska amendment, after opponents stressed the importance of

350. 491 U.S. at 176-84.

351. *Id.* at 179. The Court in *Patterson* also reaffirmed Section 1981's basic applicability to private conduct, not merely contract formation involving governmental entities. That issue had been resolved in *Runyon v. McCrary*, 427 U.S. 160 (1976), but the Court had invited reconsideration after hearing oral argument on the racial harassment issue. *Patterson*, 485 U.S. 617 (1988). The Court's reaffirmation of its *Runyon* holding was unanimous.

352. *Patterson*, 491 U.S. at 177-78.

353. *Id.* at 179.

354. *Id.* at 183.

355. *Id.* at 183 (internal citation omitted).

356. *Id.* at 189, 201-07.

357. *Id.* at 206-07.

358. *Id.* at 201-03.

having the Civil War statute available as an alternative to race discrimination remedies under Title VII. Justice Brennan reasoned that this history confirmed Congress's conscious commitment to preserving the applicability of Section 1981 for instances of on-the-job discrimination.[359]

There is a lot happening in the *Patterson* opinions, including the Court's unusual focus on reconsidering its own recent decision in *Runyon v. McCrary*[360] interpreting the scope of Section 1981. From our vantage point, however, the by-now familiar tension involves a conservative majority relying on canons to help justify a willingness to ignore what the dissent contends are demonstrable congressional preferences regarding the very issue in dispute.[361] Congress on this occasion promptly overrode the majority's position as part of the 1991 Civil Rights Act, a statute that rejected an unusually large number of Court decisions construing Title VII and related antidiscrimination provisions.[362] Still, the rapid and virtually unanimous repudiation by both Congress and a Republican president[363] cannot conceal the conservative majority's use of canons to help justify its result in the face of considerable evidence that it was thwarting legislative intent.

Our final substantive canon decision, *EEOC v. Arabian American Oil Co.*,[364] involves a dispute over the extraterritorial jurisdiction of Title VII. A United States citizen working in Saudi Arabia for a U.S. company alleged that he was discriminatorily discharged.[365] It was undisputed that Congress has constitutional authority to enforce its laws beyond U.S. territorial limits; the issue

---

359. *Id.* at 203-04.

360. 427 U.S. 160 (1976); *see supra* note 351.

361. In addition to invoking the presumption against federalizing common law absent a clear congressional mandate, Justice Kennedy also contended that because Title VII already addressed racial harassment on the job and provided for conciliation prior to litigation, § 1981 should not be read to render Title VII's "detailed procedures . . . a dead letter." *Patterson*, 491 U.S. at 181. Reliance on this maxim favoring interstatutory harmonization again ignores the reality that Congress in 1972 had explicitly declined to make the provisions of Title VII exclusive.

362. *See* Pub. L. No. 102-166, § 101, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981(b) (2000)) (providing that "make and enforce contracts" covers all terms and conditions of employment). The 1991 Civil Rights Act wholly or partially overrode at least twelve decisions. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 333 n.4 (1991).

363. *See* 136 CONG. REC. S. 16562 (1990) (Veto message from President Bush declaring that his 1990 civil rights bill would overrule Supreme Court's interpretation of Section 1981 in *Patterson*; veto relates not to *Patterson* but to other provisions of bill Congress approved); *id.* at S. 16565, 16571 (remarks of Senators Hatch and Jeffords emphasizing broad consensus between President and Congress that *Patterson* needs to be overruled).

364. 499 U.S. 244 (1991).

365. *Id.* at 247.

presented was whether Congress had exercised that authority in Title VII.[366] Justice Rehnquist, on behalf of six members of the Court, concluded that Congress had not done so.[367]

The majority relied primarily on the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only [domestically].' "[368] Justice Rehnquist added that in applying this "rule of construction," the Court would examine whether the *language* of Title VII evidenced a congressional purpose to extend coverage abroad.[369] Both the EEOC and the discharged employee pointed to two parts of Title VII as disclosing Congress's intent to legislate extraterritorially. First, within the definitions section, an "employer" is covered if "engaged in an industry affecting commerce," and "commerce" includes transactions "among the several states; or between a state and *any place outside thereof*."[370] Second, a provision exempting aliens specifies that Title VII "shall not apply to an employer with respect to the employment of aliens outside any state," and petitioners reasoned that unless the Act was meant to apply to *citizens* extraterritorially, Congress would have had no rational basis for exempting the employment of *aliens* abroad.[371]

Justice Rehnquist did not reject these interpretations as untenable. Rather, he concluded that they were no more plausible than the company's competing interpretations of the same language.[372] Given that the text was therefore ambiguous, the majority concluded that petitioners had failed to overcome the presumption against extraterritorial jurisdiction by making the required "affirmative showing" of congressional intent.[373]

In dissent, Justice Marshall took aim at what he deemed the majority's misuse of the substantive canon. The presumption against extraterritoriality had not previously been applied as a "clear statement rule," relieving a court of its obligation "to give effect to all

366. *Id.* at 248.

367. *Id.* at 248-60.

368. *Id.* at 248 (internal citation omitted).

369. *Id.* (emphasis added).

370. *Id.* at 248-49 (quoting 42 U.S.C. §§ 2000e(h), 2000e(g) (2000)) (emphasis added).

371. *Id.* at 253-54 (quoting 42 U.S.C. § 2000e-1 (2000)).

372. *Id.* at 250 (discussing company's contention that the clause "between a state and any place outside thereof" provides a jurisdictional nexus for regulating commerce not wholly within a single state (i.e., covering commerce also involving another state or a foreign country) but not a nexus to regulate conduct exclusively in a foreign country); *id.* at 254-55 (discussing company's alternative contentions that the alien exemption provision either excludes employers of aliens within the territorial possessions of the U.S., or it confirms (by negative implication) the coverage of aliens *within* the U.S.).

373. *Id.* at 250, 255.

available indicia of the legislative will."[374] As a traditional canon of construction, the presumption should be rebuttable through evidence other than the text, notably legislative history.[375] While Justice Marshall disputed the majority's view that the two key textual provisions were at all ambiguous,[376] he also relied heavily on the legislative history of the alien-exemption provision. The dissent quoted from both House and Senate committee reports, each of which described the exemption in terms reflecting a clear understanding that U.S. employers operating in foreign lands were within the purview of the Act.[377]

The Rehnquist majority in *Arabian American* is less dismissive and more deliberate than several other majority opinions we have discussed in this subpart. Nonetheless, the Court's methodological approach enables it to sidestep strong indicators that Congress meant to accomplish a very different result. By establishing this substantive canon as a barrier against considering the more ordinary indicia of legislative purpose, the Court effectively devalues "any genuine inquiry into the sources that reveal Congress's actual intentions."[378] As so often happens in these contested decisions, the result is hostile to the interests of employees that Congress ostensibly sought to protect.

3. Ideological Ramifications

A recurring theme in this subset of divisive cases is the majority's use of canons as an integral part of its determination to preclude all reference to legislative history. While the statutory text may favor the majority's reading in some instances more than in others, that reading is never close to unequivocally correct. Given this reality, the role played by the canons is especially troubling. The legitimacy of language canons, and most substantive canons, derives in important respects from the judicial perception that language being interpreted is *unclear* and additional interpretive resources are

374. *Id.* at 260-61.

375. *Id.* at 261-66, 278. Other relevant evidence of legislative intent was pertinent agency interpretations, which the dissent noted were also supportive of its position. *Id.* at 275-78.

376. *Id.* at 266-68.

377. *Id.* at 268-69 (Marshall, J., dissenting).

378. *Id.* at 278 (Marshall, J., dissenting); *see also* Shapiro, *supra* note 12, at 959 & n.195 (critical of majority reasoning). As with *Patterson*, the Court's decision here was promptly overridden in the 1991 Civil Rights Act. *See* Pub. L. No. 102-166, § 109, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981(b) (2000)).

therefore needed to help understand an inconclusive text.[379] In these circumstances, one might expect the Justices to consult both canons and legislative history, recognizing that all such interpretive aids are persuasive rather than conclusive.[380]

Yet the majority opinions discussed here assign the canons a more exalted status. They are a resource that itself can justify ignoring potentially probative evidence of legislative intent. In the language canon cases, the majority uses canons "to establish that the text is so clear that legislative history is irrelevant."[381] In the substantive canon cases, the text's *lack* of clarity triggers the majority's adherence to a policy norm *it* has identified, again ignoring altogether the possibility that *Congress* has articulated relevant policy preferences through statements in the legislative record accompanying the text. In both instances, it is the canons—not the intrinsic clarity of the text—that ostensibly justify indifference to legislative history, even though all of these Justices recognize legislative history as probative in other settings.[382] This use of the canons to trump more "purposive" resources reflects a form of judicial activism that apparently need not be acknowledged because it is couched in methodological terms. The fact that the majorities consistently favor employer interests over those of employees supports the pessimistic critique that the canons' elevated role in these divided decisions is fundamentally a façade to justify certain judicially devised policy preferences.

Admittedly, just as canon reliance in these cases is unidirectionally conservative, the legislative history is invariably cited by the dissent to support liberal or pro-employee outcomes. This, however, should not be terribly surprising, given that the

379. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 138 (2001) (Souter, J., dissenting); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260-62 (1991) (Marshall, J., dissenting). Justice Marshall observes that clear statement rules may be an exception: they shield certain judicially articulated values more than "operat[ing] to reveal actual congressional intent." *Id.* at 262.

380. *See* SCALIA, *supra* note 10, at 27 (classifying canons as persuasive, never conclusive); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 863-67 (1992) (classifying legislative history as persuasive, never conclusive).

381. *Circuit City*, 532 U.S. at 138 n.2 (Souter, J., dissenting).

382. *See, e.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730-33 (2003) (Rehnquist, J.); Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 93-94 (2002) (Kennedy, J.); Brogan v. United States, 522 U.S. 398, 403-04 (1998) (Scalia, J.); Inter-Model Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co., 520 U.S. 510, 515-16 (1997) (O'Connor, J.). Moreover, despite their harsh criticism of legislative history in general, *supra* note 131, Justices Scalia and Thomas do join numerous majority opinions that rely on legislative history. For examples of such opinions, see Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, (2003); Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, (1999).

antidiscrimination and retirement-related statutes being construed are dedicated to serving employee interests. Since the 1960s, Congress has prescribed multiple layers of federal protections for workers as part of an effort to alter the employment-at-will status quo, thereby imposing a modestly redistributive regulatory matrix on the American workplace.[383] Evidence of legislative intent will tend to support this consistently liberal legislative objective.

There may, of course, be instances where Congress arranged a compromise, and legislative history helps explain the specific intent behind that compromise. That, indeed, was the kind of record evidence invoked by the Stevens dissent in *Circuit City*.[384] More broadly, the Court's repeated reliance on legislative history to support conservative results in our 632 case dataset—even in close decisions—indicates that evidence of negotiations or compromises protecting employer interests is also a staple of the legislative record.[385] What remains distinctive about this group of cases is the majority's unwillingness to contemplate, much less identify, such indicia of congressional intent.[386] Instead, the majority in these cases regards legislative history as irrelevant, largely if not exclusively *because of the role played by the canons*. The Court thus uses interpretive techniques it promotes as neutral to help it achieve conservative results, ignoring substantial evidence that Congress had a very different purpose in mind.

C. Dueling Canons and the Legal Process Account

Professors Sunstein and Shapiro, as well as Eskridge and Frickey, all maintain that the canons perform important pragmatic functions furthering rule-of-law norms.[387] As succinctly set forth by Eskridge and Frickey, the canons serve as "gap-filling rules" that help

---

383. *See* PAUL WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 22-25 (1990); James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1568-72 (1996); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1551-58 (2002).

384. *See supra* text accompanying notes 332-336.

385. Overall, legislative history reliance is relatively neutral in ideological terms: it supports liberal decisions 49.8 percent and conservative decisions 43.2 percent of the time. Even in close cases, its invocation seems fairly even-handed: reliance accompanies liberal majorities 45.3 percent of the time and conservative majorities 46.9 percent of the time.

386. Justice Scalia in *Mertens v. Hewitt Associates* did tender a belated assertion about ERISA's subsidiary purpose but this was conclusory and not supported. 508 U.S. 248, 262-63 (1993). The other four cases simply regard legislative history as irrelevant *because of the role of canons*.

387. SUNSTEIN, *supra* note 18, at 151-53; Eskridge & Frickey, *supra* note 12, at 66-67; Shapiro, *supra* note 12, at 943.

minimize judicial arbitrariness, thereby "rendering statutory interpretation more predictable, regular, and coherent."[388] We have no wish to oversimplify these scholars' positions: they assuredly do not celebrate the canons as interpretive bromides, and each cautions against mechanical application or undue reliance.[389] Still, they share a perspective that use of the canons in practice enhances consistency and predictability—regarding how the Court treats certain word choices or syntactical configurations, and what it presumes about the allocation of power among different branches or levels of our constitutional structure.

Our results in Part III.E provide some basis for questioning this optimistic perspective. Specifically, Table XII indicates that dissenting Justices are significantly more likely to rely on language canons when language canons are also part of the majority's reasoning and are similarly inclined to invoke substantive canons when the majority too relies on such canons. These findings in turn suggest that in divided decisions, the Justices themselves are more prone to view the canons as reasonably amenable to supporting either side.

Our previous case law discussion in this Part casts further doubt on the predictability hypothesis, at least with regard to language canons. In the *Shell Oil* decision, Justice Thomas for a unanimous majority acknowledged a credible conflict between two language canons often invoked by the Court.[390] His reasoning, relying on the Whole Act Rule while rejecting the maxim that Congress uses the same term consistently across different statutes, is cogent but not irresistible. Given the number of statutes in which Congress has identified both employees and former employees as objects of its attention, a determination that this provision's reference to "employees or applicants" actually *excluded* former employees would also have been defensible.[391] In the end, the majority opinion derives much of its persuasiveness from the purposive argument that Justice Thomas withholds until the final paragraphs of his analysis.

A comparative glance at other cases discussed earlier invites similar reservations. The Court in *Coutu* and *Barrett* relied on the *expressio unius* canon—once to help foreclose and once to help

388. Eskridge & Frickey, *supra* note 12, at 66-67.

389. *See, e.g.*, SUNSTEIN, *supra* note 18, at 151; Eskridge & Frickey, *supra* note 12, at 66; Shapiro, *supra* note 12, at 958-59.

390. *See supra* text accompanying notes 258-265.

391. Such defensibility is strengthened by the majority's candid acknowledgement that the Court had recently construed "employees" in a basic definitional section of Title VII as covering only current employees. *See supra* note 258.

preserve a private right of action.[392] To be sure, the majority in *Coutu* had reasoned that it would not inferentially expand a right of action clause that it viewed as already limited in scope, whereas the majority in *Barrett* reasoned that it would not by implication constrain a right of action provision that it characterized as unconditional. Yet even these characterizations might be fairly contestable in linguistic terms. In *Barrett*, for instance, the employer and its supporting *amici* essentially invoked the Whole Act Rule, contending that the AWPA right of action had to be limited in order to allow another important provision in the Act to retain its coherence by avoiding implied preemption of well-settled state law on workers' compensation.[393] And while the majority in *Barrett* expressly declined to impose such a restriction based on the meaning of an entirely separate section of the statutory scheme, the majority in *Sutton* invoked the Whole Act Rule as its justification for imposing precisely that kind of restriction.[394]

Stepping back, it is notable that certain language canons regularly relied on in majority opinions are also frequently promoted by dissenters in those same cases without success.[395] There are at least a dozen dissents invoking the Whole Act Rule to help challenge majority reasoning that itself uses one or more canons to justify the Court's holding. Such competitive reasoning does not signify that the meaning of these canons is hopelessly relative. It does, however, suggest that decisions about when and how to use the language canons hinge on case-specific and Justice-specific considerations more than the foreseeable logic of the canons themselves. In short, reliance on the canons may be justified as situationally enlightening without in any meaningful sense promoting a more systemic predictability or consistency.

The fact remains that, in our dataset, the decisions featuring dueling canons are for the most part ideologically conservative. This result-oriented trend could qualify as a certain kind of predictability. Professor Shapiro has observed that the canons tend to favor

---

392. *See supra* text accompanying notes 235-237 and 242-44.

393. *See* Brief for Petitioner at 15-17, Barrett v. Adams Fruit Co., 494 U.S. 638 (1990) (No. 88-2035); Brief for Amici Curiae American Farm Bureau Federation et al. at 18-19, 21-22, Barrett v. Adams Fruit Co., 494 U.S. 638 (1990) (No. 88-2035).

394. *Compare Adams Fruit Co.*, 494 U.S. at 644-45, *with* Sutton v. United Airlines, 527 U.S. 471, 487 (1999).

395. For examples of conflict about proper application of Whole Act Rule, see Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 354-55, 360 (1988); Delta Air Lines v. August, 450 U.S. 346, 351, 371 (1981); Indus. Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 641 & n.45, 709 (1980). For examples of conflict about proper application of *expressio unius*, see Barnhart v. Peabody, 537 U.S. 149, 168-69, 180-81 (2003); Christensen v. Harris County, 529 U.S. 576, 582-84, 593-94 (2000).

continuity over change by promoting cautious interpretations of inconclusive text so as to minimize inadvertent sacrifices of the status quo.[396] Shapiro makes clear that he does not advocate reliance on canons when there is "sufficient evidence of legislative purpose" that change was intended.[397] The canons, however, may well be operating—especially in the Rehnquist era—to make it harder for such evidence to be deemed "sufficient."

We have already discussed an important set of cases in which language or substantive canons were used to preclude consideration of clear and uncontroverted evidence in the legislative record. A number of those decisions also feature dissents relying on canons that would support a purposive interpretation of text. Thus, for instance, Justice Souter in *Circuit City* invokes the Whole Act Rule, insisting that the exemption for employment contracts must be treated "as keeping pace with the expanded understanding of the commerce power generally" in order to make the FAA "coherent . . . as a whole."[398] Similarly, Justice Stevens in *Sutton* urges reliance on the substantive canon that the ADA should be construed broadly to effectuate its remedial purposes,[399] while Justice Marshall in *Arabian American* contends that under a proper understanding of the canon disfavoring extra-territorial jurisdiction, Congress in its Title VII legislative record overcame the presumption.[400] In these cases, and others,[401] the Court's majority ignored or rejected pleas from colleagues to rely on canons that supported legislative change. Still, while such cases may illustrate a recent trend toward ideological conservatism in the competitive use of the canons, they do not suggest the presence of any larger methodological consistency in the way the canons are likely to operate.

Two additional case law examples further address this concern regarding potential indeterminacy in canon usage. In *Mackey v. Lanier Collection Agency*,[402] a 1988 decision, the issue dividing the Court was the impact of ERISA's basic preemption clause on a general

396. Shapiro, *supra* note 12, at 927-41.

397. *Id.* at 945.

398. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 137 (2001).

399. *Sutton*, 527 U.S. at 504.

400. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 262-66 (1991).

401. *See, e.g.*, Christensen v. Harris County, 529 U.S. 576, 592 (2000) (Stevens, J., dissenting) (relying on canon that statutory exemptions should be read narrowly); Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 484 (1992) (Blackmun, J., dissenting) (relying on canon favoring liberal application of statutes protecting harbor workers); Gregory v. Ashcroft, 501 U.S. 452, 486 (1991) (Blackmun, J., dissenting) (relying on Whole Act Rule and *in pari materia* to support position that Congress in ADEA meant to cover appointed state judges).

402. 486 U.S. 825 (1988).

state garnishment law that applied *inter alia* to allow collection from welfare benefit plans after monetary judgments had been obtained against some fund beneficiaries.[403] Section 514(a) of ERISA preempts "any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan" covered by the Act.[404] Georgia's general garnishment provision makes no specific reference to ERISA plans of any kind. Writing for five members of the Court, Justice White held that the federal preemption language did not bar applicability of the state law, thus allowing the execution of judgments against ERISA welfare benefit plans.[405]

The majority opinion in *Mackey* relied in important respects on the Whole Act Rule.[406] Justice White noted that another provision of ERISA, Section 206(d)(1), explicitly barred the assignment or alienation of pension plan benefits, thus prohibiting the use of state enforcement mechanisms that would prevent *pension benefits* from being paid to pension plan recipients.[407] In the majority's view, if Section 514(a) were construed to bar garnishment of *all* ERISA plan benefits (that is, affecting welfare benefits as well as pension benefits, and affecting plans as a whole, not just direct benefit payments) there would have been no need for Section 206(d)(1). The majority declined "to adopt an interpretation of a congressional enactment which renders superfluous another portion of the same law."[408]

In dissent, Justice Kennedy acknowledged the force of the Whole Act Rule, but he contended that it actually cut in his favor. Pointing to yet another ERISA provision, Justice Kennedy observed that Congress in 1984 had added language to Section 514 explicitly exempting certain domestic relations orders from the preemptive scope of ERISA.[409] Accordingly, the dissent reasoned, by preserving only a limited class of state garnishment orders, under specifically prescribed conditions, this new Section 514(b)(7) makes clear that

---

403. *Id.* at 830-31. The Court was unanimous in its view that state law specifically regulating ERISA funds was preempted, but it split 5-4 on this general garnishment law that made no reference to ERISA.

404. 29 U.S.C. § 1144(a) (2000) (emphasis added).

405. *Mackey,* 486 U.S. at 830-841. The lineup of Justices writing opinions was somewhat unusual, in that Justice White favored limited preemption of state law while Justice Kennedy in dissent argued for a broad federal preemptive scope. Justice White was joined by Justices Rehnquist, Brennan, Marshall, and Stevens, while Justices Blackmun, O'Connor, and Scalia joined Justice Kennedy in dissent.

406. Justice White also invoked text, legislative purpose, legislative inaction, and Supreme Court precedent as part of his reasoning.

407. *Mackey*, 486 U.S. at 836 (discussing 29 U.S.C. § 1056(d)(1) (2000)).

408. *Id.* at 836-37.

409. *Id.* at 842-43 (discussing addition of § 514(b)(7), codified at 29 U.S.C. § 1144(b)(7) (2000)).

Section 514(a) otherwise applies broadly to preempt the type of general garnishment statute before the Court.[410] To Justice Kennedy, the majority's reading rendered Section 514(b)(7) totally redundant. He added that "it is preferable, in my view, to tolerate the partial overlap [with Section 206(d)(1)] rejected by the Court than to construe § 514(a) so as to render another section of the statute surplus in its entirety."[411]

In a statute as "comprehensive and reticulated"[412] as ERISA, it is perhaps unremarkable that both sides could find a plausible reference point from which to identify superfluous structural consequences if the imprecise language at issue were construed against their position. Further, both opinions in *Mackey* marshaled other interpretive resources as part of their reasoning, and one would be hard-pressed to conclude that either side's application of the Whole Act Rule was "more persuasive" within the Court or even in a larger context.[413] Yet as we have previously observed, it is in complex and technical areas that the Court is often more inclined to invoke a structural language canon such as the Whole Act Rule. The *Mackey* decision is an apt illustration of this canon's malleability in the service of Justices who are pursuing reasonable yet conflicting approaches to a close interpretive question.

In our final case law example, *Lehman v. Nakshian*,[414] the Court in 1981 had to decide whether the 1974 ADEA amendments extending coverage to the federal government conferred the right to a jury trial when federal employees sue their employer. Justice Stewart, writing for five members, held that the statute did not mandate the right to a jury trial.[415] Both language canons and substantive canons figured prominently in his reasoning.

The case revolved around the relationship between two remedial provisions of the ADEA: Section 7(c), covering actions brought against private employers and state or local governments, and

410. *Id.* at 843.

411. *Id.* at 845-46.

412. Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980) *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209 (2002) (describing the ERISA statute as "comprehensive and reticulated"); Harris Trust and Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 247 (2000) (same).

413. Although the United States was not a party, it filed an amicus brief and argued before the Court that Section 514(b)(7) clarified the broad impact of Section 514(a). *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 6, 21, Mackey v. Lanier Collection Agency, 486 U.S. 825 (1988). (No. 86-1387); *Mackey*, 486 U.S. at 838-39. The executive branch view of the Whole Act Rule secured only four votes.

414. 453 U.S. 156 (1981).

415. *Id.* at 160-69.

Section 15(c), covering actions brought against the federal government.[416] Section 7(c)(1) authorized aggrieved persons to seek "legal or equitable relief," language identical to what appears in Section 15(c). However, Section 7(c)(2), explicitly conferring the right to a jury trial, had no analog in Section 15. Justice Stewart invoked the *expressio unius* canon: Congress knew exactly how to provide for the right to a jury trial, and its failure to do so in Section 15 was highly probative.[417] He also relied on the *in pari materia* canon, reasoning that because Congress had patterned its overall Section 15 enforcement scheme after the comparable provisions for federal employees under Title VII, and Congress in the Title VII provisions clearly provided no right to jury trials, it followed that no right to a jury trial should be inferred here.[418] Although Justice Stewart maintained that in light of the majority's linguistic analysis it was unnecessary to consult legislative history, he did in fact explore that history and concluded that it too supported the majority's position.[419]

In dissent, Justice Brennan relied on the *in pari materia* canon to draw very different conclusions. Pointing to the identical "legal or equitable relief" language of Section 7(c)(1) and Section 15(c), Brennan maintained that Congress had patterned the precise federal employee provision at issue after its previously-enacted private employee section, and the Court should therefore interpret them similarly.[420] Because the Court three years earlier in *Lorillard v. Pons*[421] had held that the text of Section 7(c)(1) conferred a right to jury trial, it seemed clear to Brennan that the same text must yield the same result here.[422] From the dissent's standpoint, Section 7(c)(2) was essentially a red herring. It had been introduced while *Lorillard* was pending before the Supreme Court, in order to settle the circuit court conflict over the meaning of "legal and equitable relief" in what was then simply Section 7(c). Once *Lorillard* was decided, the enactment of Section 7(c)(2) in essence codified the Court's holding, a codification that did not detract from the dissent's canon-based analysis.[423]

---

416. 20 U.S.C. §§ 626(c), 633a(c) (2000).

417. *Lehman*, 453 U.S. at 162-63.

418. *Id.* at 163-64. The *in pari materia* canon calls for similar statutes to be interpreted similarly. *See* ESKRIDGE, FRICKEY, & GARRETT, *supra* note 35, at Appendix B.

419. *Lehman*, 453 U.S. at 165-68. The majority's willingness to consider legislative history as possibly rebutting its canon-based reasoning reflects a very different methodological approach from that taken in later years. *See supra* Part IV.B.

420. *Lehman*, 453 U.S. at 177-78.

421. 434 U.S. 575 (1978).

422. *Lehman*, 453 U.S. at 173-74.

423. *Id.* at 178-80.

The majority had one last canon to invoke in its favor. Justice Stewart observed that even if his linguistic and structural arguments and his reliance on legislative history were not dispositive, the presumption against a waiver of federal sovereign immunity dictated the Court's ruling. The sovereign immunity of the United States applies to the terms and conditions under which the government consents to be sued; accordingly, continued the majority, Congress's failure to express unequivocally in text its willingness to be subject to jury trials meant that federal employees have not been granted such a right.[424] Justice Brennan countered that the unequivocally expressed waiver of sovereign immunity contained in Section 15 was itself sufficient to cover jury trials. If anything, Congress's history of stating explicitly that no jury trial was available in a range of statutes authorizing suits against the federal government established that the sovereign immunity canon did not include a presumption against the right to a jury trial.[425]

In contrast to *Mackey*, *Lehman* is a decision involving multiple canons. As with *Mackey*, though, it is not obvious that one side's use of canons is more convincing than the other's. The *in pari materia* canon points in two plausible directions, in part because the ADEA is a hybrid statute. Congress over the years has borrowed specific language and general concepts from multiple sources, and reasonable disagreements arise as to which "other law" is deemed the appropriate pattern-setter. The clash over the sovereign immunity canon reflects a dispute regarding outer contours rather than core applicability. Here, too, one can expect disagreements given the complex body of Supreme Court precedent construing the sovereign immunity canon and the varied textual circumstances in which Congress has chosen to expose the government to lawsuits.

It should be apparent that we have been examining some "harder cases" in this subpart. When the Justices are unanimous in their application of a specific canon, or if they view the canons as pointing in only one direction, these maxims of construction will appear to enhance predictability, as do other interpretive resources relied upon without contradiction. It is the harder cases, however—those in which competing or even identical maxims support reasonable disagreements—that counsel against making extravagant claims regarding the canons' capacity to enhance consistency in judicial decisionmaking.

---

424. *Id.* at 160-61, 168-69.

425. *Id.* at 170-71.

D. Emerging Lessons

One argument regularly advanced in recent years to support the rationality and legitimacy of the canons is that they function as a kind of ordering mechanism, a set of often-invoked interpretive aids that Congress can and should anticipate when drafting, in order to enhance its lawmaking prowess.[426] As a descriptive matter, a recent case study of congressional drafting techniques seriously questions whether Congress is capable of embracing such a role for the canons. Professors Victoria Nourse and Jane Schacter interviewed a bipartisan group of sixteen Senate Judiciary Committee staffers (all attorneys) as well as lawyers from the Senate's Legislative Counsel Office.[427] They found that counsel involved in drafting are generally aware of the canons but that these rules and presumptions are not an important factor as statutory language is written or debated.[428] Legislative committee counsel regard drafting as a highly contextual and intensely pressured process, and generalized rules of construction cannot be readily integrated into that process.[429] Further, because drafting is focused on securing collective action through negotiated agreement, often involving a shifting coalition of both invited and late-arriving players, the canons' putative virtues—promotion of clarity and predictability—are not as highly valued by lawmakers as they are by many judges.[430]

It is possible that the Nourse and Schacter study tells only part of the story about how Congress actually performs—or might be able to perform—as a lawmaking enterprise. But even assuming *arguendo* that Congress is more educable than Professors Nourse and Schacter contend, our findings and analyses raise considerable doubt as to why lawmakers *should* look to the canons for guidance on any systemic basis. Our empirical and doctrinal review suggests that the canons are being overvalued in terms of their ability to promote either predictability or impartiality in judicial reasoning.

1. From the standpoint of predictability, we reported that when the majority relies on language canons or substantive canons in

426. *See* SUNSTEIN, *supra* note 18, at 154 (discussing canons' function to improve lawmaking); Eskridge & Frickey, *supra* note 12, at 66-67 (discussing canons' role as signaling devices to legislative drafters, enabling them to lower costs of drafting statutes).

427. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 578-79 (2002).

428. *Id.* at 600-04.

429. *See id.* at 590-97 (describing legislative drafting process as perceived by key staffers); *see also* Brudney, *supra* note 296, at 16-17, 21-26 (discussing fractured and politically sensitive nature of lawmaking process in Congress).

430. *See* Nourse & Schacter, *supra* note 427, at 594-600, 614-16.

nonunanimous opinions, the dissent is significantly more likely to invoke that same type of canon as well. An important implication of this finding is that the Justices regularly are prepared to argue that the canons do *not* produce clarity, by applying them in ways that are incompatible, if not inconsistent, when competing to advance principled justifications.

Our discussion of individual cases illuminates how certain key language canons lend themselves to such malleable uses. The Whole Act Rule rests on a presumption that statutes should be understood, whenever possible, to be structurally coherent and to contain no surplus phrases or provisions. Yet Congress's complex statutory schemes regulating the workplace—ERISA, Title VII, the ADEA, and others—typically reflect an accretion of multiple enactments, addressing both discrete and overlapping issues over a period of years if not decades. Such lawmaking histories tend to produce linguistic residues, redactions, and repetitions. Under these circumstances, it is not surprising that thoughtful Justices, supplemented by arguments from able counsel, will often reach conflicting understandings derived from considerations of structural integrity or coherence. The disagreement in *Mackey* was a classic example of this conflict involving the Whole Act Rule alone. And presumptions based on structural coherence become even more susceptible to principled disagreement when the Court also addresses the possibility of consistent usage across distinct regulatory schemes.[431]

The *expressio unius* canon similarly generates a likelihood of reasonable divergent applications.[432] Two presumptions about law-

431. Majority opinions in *Lehman v. Nakshian*, 453 U.S. 156 (1981), *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), and other cases have invoked this broader vision of harmonious drafting to help explain why a phrase in one statute should be construed to have the same meaning as it had been given in a different area of workplace law. At the same time, the dissent in *Lehman*, and a unanimous majority in *Robinson*, illustrate the tensions that so often arise between reliance on such interstatutory comparisons and claims based on structural coherence within a single statutory scheme. *Lehman*, 435 U.S. at 172-82; Robinson v. Shell Oil, 519 U.S. 337, 340-46 (1997); *see also* Buzbee, *supra* note 260, at 234 (critical of counterfactual assumptions about omniscient legislators in drafting process). Professor Buzbee contends that intrastatutory linguistic comparisons such as *expressio unius* rest on more defensible aspirational assumptions about thoroughness in drafting consideration, because there is an enacting coalition that is aware of which provisions will share space within a single statute. *Id.* at 225-28. But tbe concept of a single Title VII statute, or a single ERISA statute, is itself suspect given the succession of revisions, modifications, and additions that are crafted by a series of distinct enacting coalitions over a period of many years.

432. *See, e.g.*, Christensen v. Harris County, 529 U.S. 576, 583-84, 593-94 (2000) (majority and dissent squarely debate applicability of *expressio unius* to a provision of Fair Labor Standards Act); John Hancock Life Ins. v. Harris Trust & Sav. Bank, 510 U.S. 86, 96-97, 112-13 (1993) (majority and dissent disagree on applicability of *expressio unius* approach to text of ERISA).

writing techniques underlie this canon: that legislative drafters do not use excessive or dispensable language, and that they do use particular words or phrases in different parts of a single statutory scheme to convey the same meaning.[433] Once again, our cases demonstrate how these beguiling presumptions minimize the very real prospects for principled disagreement. The sharp division in *Circuit City* over the meaning of "commerce" in two different sections of the FAA pertained importantly to whether the different words modifying "commerce" were probative or essentially superfluous. And the Court's candid discussion in *Robinson* recognized that despite a specific Title VII definition of the word "employee," the term has two quite different connotations as used in different parts of that Act.

It also is worth recalling that language canon reliance in majority opinions by both conservative Justices and liberal Justices has produced results remarkably consistent with their respective ideological preferences.[434] This finding further supports our conclusion that the language canons cannot serve as a source of systemic interpretive guidance for lawmakers. We do not mean to suggest that the Justices apply these canons in a disingenuous manner. Rather, it is precisely because the language canons are so adaptable in their application that they can be, and have been, invoked to help justify positions that have deeper ideological or policy-related foundations.

The substantive canons at first glance appear more promising as a set of signals to congressional drafters. Because these canons tend to set forth judicial policy norms or preferences, they could be viewed as more predictably instructive. While certain substantive canons are relatively open-ended in policy terms,[435] others relied on by the Court seem to convey a more precise prescriptive message. Since the 1980s, for instance, the Court has regularly held that Congress must speak in unequivocally clear terms if it means to abrogate the states' Eleventh Amendment immunity. Over a longer period, the Court has declared that Congress must be reasonably clear if it wishes to assert extraterritorial jurisdiction, to interfere with traditional or historic state functions, or to waive the immunity of the federal

433. *See* R. N. Graham, *In Defence of Maxims*, 22 STAT. L. REV. 45, 63-64 (2001) (discussing and amplifying these two presumptions).

434. *See supra* text accompanying tbl.X.

435. The canon of avoiding constitutional issues and the presumption against repeals by implication offer only vague guidance to Congress: it is more difficult to anticipate, much less avoid, constitutional problems that may arise in the future, and similarly challenging to anticipate how current language may be construed in light of potentially affected provisions from earlier statutes often dispersed through the U.S. Code.

government including the particular conditions under which the government consents to be sued.[436]

Still, one concern raised by these policy-based maxims is just how much weight to accord them. In promoting particular substantive values, the canons may function as virtually irrebuttable clear statement rules or as mere tiebreakers, but most often they operate as presumptions that can be overcome by the cogent force of other interpretive resources.[437] Assessing the persuasiveness of such other resources—plain meaning, legislative history or purpose, Supreme Court or common law precedent—allows for considerable discretion and, hence, uncertainty as to the probative impact of the substantive canon. The Court's ERISA decisions invoking the general anti-preemption presumption are illustrative in this regard. Over the past fifteen years, the presumption has been relied on in numerous cases to help justify restricting the scope of ERISA,[438] and it has been distinguished or disregarded in a comparable number of other cases that have imposed ERISA preemption.[439] Similarly, with respect to the presumption against extraterritorial jurisdiction, the Justices' heated disagreement in the *Arabian American Oil* case[440] reflects divergent understandings both as to how much weight the presumption should receive and as to how consistently the Court has applied it over the years.[441]

Apart from the need to reconcile judicial policy norms with an array of competing interpretive resources through case-by-case analysis, there is an additional concern about the Court's ability to furnish interpretive guidance through its choice of substantive canons. It is far from clear that an enacting Congress can reasonably anticipate future cycles of Supreme Court preference for particular policy norms. Typically, the Court does not thoroughly engage the major aspects of a new congressional regulatory scheme until a decade or more has passed following enactment. Accordingly, there is the risk that legislators who debate and approve that scheme simply cannot

---

436. *See supra* text accompanying notes 56-57 and 368-373.

437. ESKRIDGE, FRICKEY, & GARRETT, *supra* note 35, at 851; POPKIN, *supra* note 119, at 201.

438. *See, e.g.*, Rush Prudential HMO v. Moran, 536 U.S. 355, 363-65 (2002); Cal. Labor Standards Enf. v. Dillingham Constr., 519 U.S. 316, 330-32 (1997); Mass. v. Morash, 490 U.S. 107, 118-19 (1989).

439. *See, e.g.*, Egelhoff v. Egelhoff, 532 U.S. 141, 151-52, 156-61 (2001) (majority and dissenting opinions); Boggs v. Boggs, 520 U.S. 833, 860-61 (1997) (dissenting opinion); FMC v. Holliday, 498 U.S. 52, 66-67 (1990) (dissenting opinion).

440. EEOC v. Arabian Am. Oil, Co., 499 U.S. 244 (1991); *see supra* notes 368-377 and accompanying text.

441. *Compare Arabian American* 499 U.S. at 248-49 (majority opinion) *with id.* at 260-66 (dissenting opinion).

foresee how the Court's substantive canon priorities are likely to evolve in the longer-term. During the 1960s and 1970s, when most of the major workplace-related statutes being litigated today were enacted,[442] the reigning interpretive presumptions favored broad deference to congressional judgment in the exercise of its Article I and Fourteenth Amendment powers[443] and respect for Congress's purposive remedial efforts in general.[444] Two decades later, inconclusive language in these legislative texts related to states' sovereign authority was being subjected to very different judicial policy norms.

One could argue that based on current preferred substantive canons, Congress today should take pains to insert explicitly into text every conceivable manifestation or extension of its legislative authority. Alternatively, the current Congress might try to tailor its drafting technique to what it can plausibly expect will be the Court's next set of elevated policy-based presumptions or "dice-loading rules."[445] The latter approach would, of course, tend to vitiate further the predictive value of the substantive canons. Still, given the unusually public tensions within this Court regarding the proper distribution of sovereign authority between Congress and the states, it may well be that a suitably educated Congress should anticipate a reordering of at least some current judicial policy preferences.[446]

In sum, we have shown how, for somewhat different reasons, neither the language canons nor the substantive canons can be counted on to generate consistent, objective guidance regarding the interpretation of workplace law statutes. Our explanation for this shortfall goes beyond Llewellyn's assertion of radical indeterminacy based simply on the presence of a countercanon for every canon.[447] The systemic indeterminacy we have described is attributable to a

---

442. *See, e.g.*, Equal Pay Act of 1963, Title VII of 1964 Civil Rights Act (extended to federal employees in 1972), ADEA of 1967 (extended to federal employees in 1974), Occupational Safety and Health Act of 1970, Federal Coal Mine Safety and Health Act of 1969, ERISA in 1974.

443. *See* Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 447-48, 487-89, 494-95 (2000); Colker & Brudney, *supra* note 122, at 89-94..

444. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW xci-cvi, 1374-80 (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994).

445. SCALIA, *supra* note 10, at 28.

446. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 97-98 (2000) (dissenting opinion) (asserting that four Justices do not recognize *stare decisis* on Court's Eleventh Amendment decisions and implying they will overrule these decisions as soon as practicable); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 740-41 (2003) (concurring opinions) (reaffirming this position on behalf of same four Justices).

447. *See* Llewellyn, *supra* note 22, at 401-06.

confluence of factors. Language canons that contemplate the structural integrity of the law often invite principled disparate applications. Key substantive canons are assigned varying weights in different case-specific circumstances. Most important, the multilayered and detailed arrangement of our basic regulatory schemes typically allows for several canons to be arrayed on each side of a contested case. These factors combine to assure the exercise of considerable judicial discretion when applying the canons. Such discretion is an important component of the Court's decisionmaking process, but it does undermine claims that reliance on the canons somehow makes judicial reasoning as to the meaning of legislation more predictable or consistent.

2. With respect to the goal of impartiality, the most strikingly consistent finding from our study may well be the ideologically-colored tension on the Rehnquist Court between majority invocation of canons and dissent reliance on legislative history. We expected to observe some wariness about legislative history within canon-dependent majority opinions, given the broader pattern of diminished reliance on such legislative materials and the particular skepticism expressed by public choice scholars and some current Justices as to the underlying value of "congressional intent" evidence beyond text.[448] What we discovered from our subset of majority opinions, however, is much less neutral than generalized wariness.

In their revived status, the canons have been hailed as shared conventions that can help interpreters to decode ambiguous or inconclusive texts.[449] Intentionalist evidence, derived from legislative history, has been promoted over the years as serving a similar function with the added value of possessing a democratic pedigree.[450] To the extent that intentionalist efforts at decoding are now deemed more vulnerable to error, a pragmatic interpreter might well try to reconcile the two resources by discounting the weight accorded to record evidence in the face of persuasive canon-based reasoning. The Court in the cases we analyzed went further—it relied on the canons to preclude any weighing of legislative history at all.[451] That

448. *See supra* text accompanying note 120.

449. Manning, *supra* note 9, at 291-92.

450. *Id.* at 288-89.

451. We discussed ten such cases. *See supra* Part IV.B. While we focused on decisions and reasoning we found especially revealing, we also noted that the tension between canons and legislative history extends beyond these ten cases. *See, e.g.*, Raygor v. Regents of Univ. of Minn. 534 U.S. 533 (2002); Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992); Norfolk & Western Ry. v. Am. Train Dispatchers Ass'n, 499 U.S. 117 (1991); Library of Cong. v. Shaw, 478 U.S. 310 (1986); *see also supra* note 275 (discussing seven additional cases in which language canon dissents clash with reliance on legislative history by liberal majority).

interpretive move would likely be criticized as anti-legislative, at least from within the intentionalist camp.

Such criticism, however, should carry comparatively little methodological bite for canon supporters, so long as the results of the majority's preclusive reasoning seem to reflect disinterested and impartial analysis. It is not hard to imagine a subset of decisions in which the ignored or excluded legislative record evidence in numerous instances supported the employee's legal position while on many other occasions favoring the employer's.[452] Insofar as the canons are being used objectively to discredit reliance on legislative history, one would expect the consequences of such discrediting to be relatively content-neutral.

Justice Scalia has aptly observed that the canons are meant to be persuasive, not conclusive. In responding to persistent concerns about their thrust-and-parry imprecision, he has defended their role as one among many interpretive resources that help courts to provide uniform and objective answers regarding the reasonable meaning of statutes.[453] While the Court's answers in this group of decisions is very close to uniform, the outcomes reached are harder to justify as objective. It is difficult to escape the conclusion that the language canons and substantive canons in such cases are functioning more as a façade to promote judicial policy preferences than as a principled methodological tool.

3. To be sure, the subset of cases that exemplifies strategic use to serve policy-related ends is just that—a subset. Our larger collection of majority opinions reflects that the canons can and do assist in the performance of valued interpretive functions. As rules of thumb addressing how certain words or phrases often interrelate, or how a hypothetical legislature might expect its authority to be reconciled with that of other lawmaking entities, the canons "help uncover competing interpretive possibilities."[454] When these rules of thumb are understood as presumptive rather than conclusive, they are subject to being questioned, challenged, or distinguished in light of other interpretive factors.[455]

---

452. *See supra* note 385 (reporting that legislative history reliance supports an equal share of liberal and conservative results in close cases, and overall).

453. SCALIA, *supra* note 10, at 27-28. As we noted earlier, Justice Scalia's justification here is for language canons, rather than substantive canons, although he specifically includes "clear statement" protection for state sovereign immunity as a commonsense norm more than a substantive canon. *Id.* at 29.

454. Graham, *supra* note 433, at 68.

455. *See, e.g.*, Varity v. Howe, 516 U.S. 489, 511 (1996) (using language canon to raise a question about congressional intent); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 261-62 (1991)

Such reflective and ongoing conversation within judicial opinions deepens the interpretive inquiry, by effectively encouraging courts to consider additional sources of legislative meaning, and even to appreciate how the rules of thumb themselves often point persuasively in divergent directions.[456] Some of the decisions we examined used canons to recognize and respond to arguments raised by dissenting Justices or nonprevailing parties. Other decisions relied on canons to help explain and justify a result which, although unanimous, was not therefore free from doubt.

In performing these functions, the canons can provide shape and promote coherence for individual majority opinions, which over time helps to build professional and public respect for the body of work generated by the Court. Of course, other interpretive resources contribute in precisely the same way to constructing the Court's case-by-case reputation for rational, principled decisionmaking. Indeed by invoking a range of resources in virtually every majority opinion—textual and contextual, historically-based and contemporary, descriptive and normative—the Court invites the legal profession to anticipate, and strive for, an approach to judicial reasoning that is cautious, deliberative, and objective.

Like any interpretive resource, however, the canons carry both inherent limitations and risks of misuse. The risks have become more serious in recent times, given the normative claims for special status that have been advanced on the canons' behalf. It is possible that the theorized accounts celebrating predictability or neutrality are influenced to some extent by a perceived distinction between law and politics. Disputes over the meaning of abstract Latin phrases, or freestanding policy maxims, may seem relatively respectable and law-like not only to scholars but also to judges and the attorneys who argue before them. These arguments may be contrasted, even if subconsciously, with messier, more politically tinged disagreements about the implications of committee reports or floor statements. The presence of such subtle favoritism for "law-based" argumentation may in part reflect an understandable impulse to defend the legitimacy of judicial reasoning in a vulnerable, "politicized" era.

Still, our findings and analyses suggest that the canons—at least as applied by the Supreme Court in this area of law—are not entitled to this added measure of respect. Once we see in detail how readily canons can be used to defend contradictory results, and how

---

(Marshall, J., dissenting) (arguing for use of substantive canon as presumption that triggers consideration of legislative history and other "conventional techniques" of interpretation).

456. *See* Graham, *supra* note 433, at 68 (discussing benefits of maxims).

they have been used to promote judicial policy preferences at the expense of evident congressional intent, it becomes problematic to view them as systemically contributing to a consistent or impartial methodology of interpreting statutes. The decisions in our dataset, aggregatively and individually, demonstrate these limitations and pitfalls.

CONCLUSION

The issues we set out to explore are not new. Sixty years ago, Justice Jackson, confronted with plausibly competing canon-based arguments, wondered out loud, "what's a judge to do?"[457] More recently, scholars and judges have advanced a range of descriptive and normative models to explain or justify how the canons operate. While the role of this interpretive resource has been heavily theorized, it has also been underexplored from an empirical standpoint. Our effort to demonstrate the complexity and variability of canon applications is a first step toward redressing that imbalance.

The canons are distinctly more popular with the Supreme Court today than they were a generation ago. Part of that popularity includes a certain elevation in their status above other interpretive resources, at least for some members of the Court. Yet, as we have shown, language canons turn out to be remarkably adaptable when applied to the comprehensive, complex, and often confusing regulatory schemes that define our statutory landscape. Accordingly, it is a mistake to expect that canons like *expressio unius*, *in pari materia*, or the Whole Act Rule can provide predictable guidance or enhance the clarity of statutory interpretation in any larger sense. The malleability of these language canons, and the uncertain weight and cyclical fashionability of certain substantive canons, should serve as a warning against unduly ambitious claims on their behalf.

As our study also indicates, the canons in recent times have been applied in ideologically slanted ways that are hostile to considerations of legislative purpose or intent. That, too, is a dimension of canon usage on which Justice Jackson offers some historical perspective.[458] There are deep-seated tensions between the

457. S.E.C. v. C. M. Joiner Leasing Corp., 320 U.S. 344, 353 (1943).

458. *See id.* at 350 n.7 (observing that the preface to Sutherland's first edition on statutory construction, published in 1890, scorned the legislative enterprise as interfering with the law's "process of . . . intelligent judicial administration," and noting the modest progress made by the third edition (published in 1943) which "reflect[ed] the growing acceptance of statutes as a creative element in the law rather than . . . as 'legislative interference' ") (internal citations omitted).

canons and legislative history, on this Court as in earlier times. In a subsequent article, we hope to examine the Court's use of legislative history as a resource during the extended period of our dataset.

In the end, the canons are only one of many interpretive tools available to judges engaged in the deliberative process. Whether they serve as a form of neutral reasoning depends both on how they are used in a range of settings and on how they are understood to have been applied by the Court's various audiences — lower courts, lawyers, scholars, and the attentive segments of the public. Our showing, that the Court's reliance on canon-based reasoning can seem plausible and "objective" under one set of conditions, unpredictable and inconsistent in a second setting, and strategic or ideologically driven in a third, offers a cautionary message for proponents of any particular approach to judicial reasoning. While the canons may be situationally useful as an interpretive resource, they should hardly be esteemed as a first among equals.

Appendix: Differing Types of Reliance on Language Canons

In *Barnhart v. Sigmon Coal Co., Inc.*,[1] the Court held that under the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act),[2] the Commissioner of Social Security was barred from assigning retired miners to the direct successors in interest of out-of-business coal mine operators. Writing for six members of the Court, Justice Thomas concluded that the Coal Act unambiguously prohibited the assignment of responsibility for insurance premiums that the Commissioner had made. Justice Thomas relied primarily on the statutory language itself; the Act listed three categories of "related person" to which the disputed retirees could be assigned, and this successor corporation did not fall into any of those categories.[3]

Justice Thomas then relied on the *expressio unius* canon for additional support. He noted that because Congress had explicitly provided for successor liability in two other sections of the Coal Act, neither of which applied to this factual setting, Congress's failure to do so in the section being litigated precluded any inference of liability.[4] The Commissioner and the dissenting Justices relied on floor statements from two key Senate sponsors stating the Senators' understanding that the definition of "related person" was meant to be broad enough to encompass successors like the one in *Barnhart*.[5] The Commissioner and the dissenters also contended that a less literal reading of "related person" would support Congress's underlying purpose of identifying those persons (such as direct successors to a collective bargaining agreement) most responsible for plan liabilities.[6] Justice Thomas considered these legislative history and purpose arguments, but he found them unavailing in the face of clear statutory text.[7]

In *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*[8] the Court unanimously ruled that the Director of the Office of Workers' Compensation Programs ("OWCP") in the Department of Labor lacked standing to appeal a decision by the Department's Benefits Review Board ("BRB") which was adverse to an injured

1. 534 U.S. 438 (2002).
2. 26 U.S.C. § 9701 et seq. (2000).
3. *See Barnhart*, 534 U.S. at 451-52.
4. *Id.* at 452-54.
5. *Id.* at 465-66 (Stevens, J., dissenting).
6. *Id.* at 464-65, 467.
7. *Id.* at 456-62.
8. 514 U.S. 122 (1995).

employee claimant. The claim arose under the Longshoremen and Harborworkers Compensation Act ("LHWCA"), and the Secretary of Labor had delegated all administrative responsibilities under that Act to OWCP. Writing for eight members, Justice Scalia focused on the language of the text that allowed appeals from a BRB order by "any person adversely affected or aggrieved by" the order.[9] He emphasized that the phrase "person adversely affected or aggrieved" was a term of art dating back to New Deal statutory drafting, and that the phrase had nowhere else been construed by a court to include an agency in its regulatory or policymaking capacity.[10]

Justice Scalia then invoked linguistic comparisons to other sections of the U.S. Code. He noted that Congress in a number of federal statutes had explicitly conferred standing on a federal agency acting in its governmental capacity, and he determined that "the LHWCA's silence regarding the Secretary's ability to take an appeal is significant when laid beside [those] other provisions of law."[11] Justice Scalia went on to reject the OWCP's argument that the Court should reason by analogy to the similarly administered Black Lung Benefits Act, which does confer party status on the Secretary. For Justice Scalia, it was precisely the linguistic difference on this matter between LHWCA and the Black Lung statute that provided reassurance.[12]

The opinions from Justices Stevens and Blackmun also make use of language canons, but the framework in which they are applied is rather different. In *Crandon v. United States*,[13] the Court unanimously held that a federal law, criminalizing a government employee's acceptance of supplemental compensation for his government service, did not apply to a severance payment made by the employee's private employer before the recipient became a government employee. Justice Stevens's majority opinion initially observed that, although awkwardly drafted, the literal text of Section

9. 33 U.S.C. § 921(c).

10. *Newport News*, 514 U.S. at 126-28.

11. *Id.* at 129. Although the form of this argument ("Congress knows how to confer agency standing, so we should infer it chose not to do so here") is quite similar to *expressio unius*, Scalia's use of interstatutory linguistic comparisons may make *in pari materia* the more apt canon heading. *See* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 221-25 (2000) (discussing Justice Scalia's use of this technique).

12. *Newport News*, 514 U.S. at 135. Justice Ginsburg, who concurred in the judgment, observed that the Court's decision had "the practical effect" of imposing a "disparity" in the operation of two compensatory schemes—LHWCA and the Black Lung statute—that Congress had intended should work in the same way. *Id.* at 136. She went through a detailed review of LHWCA amendments over the years to support her view that Congress never meant to create the disharmony in administration imposed by the Court here, but added that it was up to Congress to correct what was obviously an oversight. *Id.* at 136-42.

13. 494 U.S. 152 (1990).

209(a) (the conflict of interest provision at issue) supported the Court's conclusion. But writing for six members, Justice Stevens recognized that before 1962, the disputed provision had been unambiguously limited to individuals who were already government officials or employees.[14] In response, he relied at some length on the legislative history accompanying the 1962 revision to conclude that elimination of the unambiguous language had not been intended to broaden the Act's coverage.[15]

After his legislative history analysis, Justice Stevens made use of *expressio unius* and the Whole Act Rule. He noted that Congress in two other 1962 revisions to the same statute (Sections 201 and 203) had inserted unambiguous language to cover pre-employment payments, suggesting the absence of such language in Section 209(a) was deliberate.[16] In addition, two companion provisions to Section 209(a) (Sections 209(b) and (c), also added in 1962) plainly focus only on payments to employees, and the majority suggested that the scope of Section 209(a) should be harmonized with that approach.[17] Finally, Justice Stevens relied on legislative purpose, the rule of lenity, and agency deference to help justify the result reached by the Court.[18]

In *Loeffler v. Frank*,[19] the Court ruled that an award of prejudgment interest could be made in a successful Title VII lawsuit brought against the U.S. Postal Service. Justice Blackmun relied heavily on the Court's precedents interpreting the 1970 Postal Reorganization Act. Writing for five members, he held that in empowering the newly created Postal Service to "sue and be sued," Congress in 1970 had wanted Postal Service liability to be the same as that of any other commercial enterprise.[20] The majority further noted the Court's prior decisions that this "sue and be sued" language could serve as a waiver of sovereign immunity from awards of interest that are incidental to the lawsuit itself.[21]

---

14. *Id.* at 162.

15. *Id.* at 162-64.

16. *Id.* at 163-64.

17. *Id.* at 164.

18. *Id.* at 166-68 (legislative purpose); *id.* at 168 (substantive canon on lenity); *id.* at 164 (deference to Attorney General's contemporaneous opinion). It is noteworthy that Justice Scalia, in an opinion concurring in the judgment (joined by Justices O'Connor and Kennedy), made more elaborate use of the same language canons, and also relied on the dictionary definition of "salary," while eschewing reliance on legislative history or agency deference. *Id.* at 168-82.

19. 486 U.S. 549 (1988).

20. *Id.* at 554-56 (relying heavily on Franchise Tax Bd. of Calif. v. USPS, 467 U.S. 512 (1984)).

21. *Id.* at 555.

Justice Blackmun's language canon reliance came as he considered the argument that Congress in 1970 had meant for the "sue and be sued clause" to be construed narrowly with respect to interest awards. Blackmun reasoned that because Congress had included specific restrictions on the operation of the clause in several other provisions of the Act that did *not* cover interest payments, "the natural inference" was not to imply a restriction as regards such payments.[22] Justice Blackmun also made use of legislative history, legislative purpose, and substantive canons to support the Court's decision.[23]

22. *Id.* at 557.

23. *Id.* at 561-62 (legislative history); *id.* at 556-57 (legislative purpose); *id.* at 554-55 (substantive canon that "sue or be sued" provisos shall be liberally construed as sovereign immunity waivers in the commercial arena). Justice White's dissent (joined by Justice O'Connor and Chief Justice Burger) relied on the appellate court opinion below, which had reasoned that the Supreme Court precedents precluded prejudgment interest in this setting. *Id.* at 566.

***

The Civilization of the Criminal Law

Christopher Slobogin *58 Vand. L. Rev. 121 (2005)*

This Article explores the jurisprudential and practical feasibility of a "preventive" regime of criminal justice, based on assessments of dangerousness and the provision of treatment designed to reduce it .Defense of a purely preventive regime has been rare in the legal literature since the 1960s, when just deserts philosophy became popular and preventive approaches fell into disrepute. The case for a preventive regime nonetheless deserves serious consideration in the twenty-first century, as an increasing number of jurisdictions adopt harsh determinate sentencing based on desert principlcs, and in the wake of the American Law Institute's recent announcement that its planned revision of the Model Penal Code will forsake the original Code's focus on reform of prisoners and instead endorse a just deserts approach to sentencing.

The Article first looks at jurisprudential objections to a prevention regime, which all center on its perceived failure to do "justice." It contends that such a regime would neither slight human dignity nor undermine the general deterrence and character-shaping goals of the criminal law. The second part examines concerns about the feasibility of a preventive system, including questions about the accuracy of predictions, the efficacy of treatment, and the costs of a reform-oriented justice system. It concludes that these concerns are overstated, and in any event are less serious than the practical problems that afflict the punishment model. The third part describes one further reason for favoring prevention over traditional punishment: a preventive regime is much better at assimilating the proliferation of scientific findings that call into question humans' ability to control their actions, which is the central premise of a punishment system based on desert.

The view taken in this Article is exploratory, however. For a number of reasons, legal and sociological, one might be ambivalent about instituting a full-blown preventive regime, at least in the immediate future. Accordingly, the conclusion to the Article suggests a

transitional compromise, which maintains culpability as the threshold for government intervention, and reserves application of the preventive model for disposition, in what amounts to a modern version of indeterminate sentencing.

***